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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

Court of Common Pleas,

AND

OTHER COURTS.

With Tables of the Cases and Principal Matters.

By PEREGRINE BINGHAM,

OF THE MIDDLE TEMPLE, ESQ. BARRISTER AT LAW.

VOL. IX.

FROM TRINITY TERM, 2 WILLIAM IV. 1832, TO
EASTER TERM, 3 WILLIAM IV. 1833,

BOTH INCLUSIVE.

LONDON:

PRINTED FOR SAUNDERS AND BENNING,

(SUCCESSORS TO J. BUTTERWORTH AND SON,)

43. FLEET-STREET.

1833.

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NOV 27 1901

LONDON:
Printed by A. SPOTTISWOODE,
New-Street-Square.

JUDGES

OF THE

COURT OF COMMON PLEAS,

During the Period contained in this VOLUME.

The Right Hon. Sir NICHOLAS CONYNGHAM TINDAL, Knt. Ld. Ch. J.

Hon. Sir JAMES ALLAN PARK, Knt.

Hon. Sir STEPHEN GASELEE, Knt.

Hon. Sir JOHN BERNARD BOSANQUET, Knt.

Hon. Sir EDWARD HALL ALDERSON, Knt.

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CASES

ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Trinity Term,

AND THE VACATION ENSUING,

In the Second Year of the Reign of WILLIAM IV.

1832.

GRISSELL and Others, Executors of W. PETO, *v.* J. PETO.

May 26.

THE Plaintiffs sued as the executors of *W. Peto*, who had directed his property to be distributed among certain of his relations in five portions.

There had been, on the subject of this distribution, a suit in Chancery, in which the Plaintiffs' attornies had appeared for the parties interested in three fifths of the property, and *Lake* and *Wilkinson*, the Defendant's attornies, for the parties interested in the other two fifths. Upon affidavit of these facts, and that the Defendant in this action had not been interested in the Chancery suit,

The Court refused to restrain the Defendant's attornies from acting in the cause, on the ground that they had obtained a knowledge of the Plaintiff's case in the course of a Chancery suit, in which they had been acting in conjunction with the Plaintiff, and in which the Defendant had no interest; the Defendant's attornies deposing, that, in that suit, they acted also for the Defendant.

1832.

GRISSELL v. PETO.

Wilde Serjt. obtained a rule *nisi* to restrain *Lake* and *Wilkinson* from acting as attornies for the Defendant in this action, upon the ground that in the Chancery suit they had obtained a knowledge of the Plaintiffs' case, of which they ought not now to be permitted to avail themselves.

Coleridge Serjt., who shewed cause, relied upon an affidavit in which *Lake* and *Wilkinson* deposed, that in the Chancery suit they had acted for the Defendant as well as for others, and had obtained little more information than would have been furnished by the Plaintiffs' bill of particulars. He deprecated depriving the Defendant of the assistance of an agent who was best acquainted with the whole of the transactions.

Wilde. It is not deposed that the Defendant was interested in the Chancery suit; and it would be prejudicial to the administration of justice, if his agents should be permitted to turn against the Plaintiffs, knowledge obtained in a matter in which the Defendant was not a party interested, and in which his agents were acting in conjunction with the Plaintiff.

TINDAL C. J. I am far from saying that a case of this sort may not arise, in which the circumstances may be sufficiently strong to induce the Court to interfere; but the circumstances disclosed in this case would not authorize us to interpose in the manner required. The attornies depose that in the Chancery suit they were concerned for the Defendant, and if we were not to give them credit for proper conduct in the business of the suit, we should be meting out too nicely the modes by which they are to obtain the information necessary for the interest of their client, particularly when they state that they have obtained little more than would have been

been furnished by a bill of particulars in this action. Without any allegation of misconduct, the application for the interference of the Court is at least premature. And it could not be of any great advantage to the Plaintiff if another attorney were named for the Defendant, since nothing could prevent his present attornies from communicating the knowledge they possess.

1832. GRISSELL v. PETO.

PARK J. The motion is a novelty, and the Court ought not to interfere prematurely; particularly as the attornies are amenable to the jurisdiction of the Court if any improper conduct be alleged against them.

GASELEE J. So many persons attend the Master's office and take copies of proceedings in the course of a Chancery suit, that it would be difficult to draw any line to interference on the ground suggested.

BOSANQUET J. I am of the same opinion: but I by no means wish it to be thought a case may not occur in which the Court may think it right to interfere.

Rule discharged.

ALSTON and Others *v.* SCALES. *May* 28.

Surveyor of highway is liable in case to reversioner, for subtraction of a portion of his bank by the road side, although the property is the better for what the surveyor has done.

CASE for injury to the reversion. The Plaintiff's property was separated from a carriage highway by a ragged bank, with elder bushes growing on the top. The highway, which led to *London*, was not twenty feet wide.

The Defendant, surveyor of the highway, pared the

1832.

ALSTON v. SCALES.

bank, the whole of which belonged to the Plaintiff, and made it straight in divers places; but in so doing, took away a little of the soil. The occupier, however, stated that the premises were the better for what had been done. And the Defendant relied on this, as well as on the 13 *G.* 3. *c.* 78. *s.* 15., by which it is enacted, "That the surveyors of the highways shall, and they are hereby required to make, support, and maintain, or cause to be made, supported, and maintained, every public cart-way leading to any market-town, twenty feet wide at least; and every public horse-way or drift-way, eight feet wide at the least, if the ground between the fences inclosing the same will admit thereof."

Alderson J., before whom the cause was tried at the last *Middlesex* sittings, told the jury that the question was, whether permanent injury had been done to the land; that, in his opinion, the removal of soil was a permanent injury; and that the projecting sides of the bank formed a portion of the Plaintiff's fence, as well as the bushes on the top.

A verdict having been found for the Plaintiff, for nominal damages,

Taddy Serjt. moved for a new trial, on the ground that the jury had been misdirected on the subject of damage, and the boundary of the Plaintiff's fence; contending that injury to the land could not be occasioned by that which improved the property, although it might remove a portion of the soil; and he put the case of a drain: and that, at all events, the Defendant was justified by the highway act, according to which he had a right to cut away the soil as far as the bushes, which must be taken to be the proper fence.

The *Court*, however, held that the direction to the jury was correct on both points; that the removal of the smallest

smallest portion of soil must, in general, be esteemed an injury to the land, because it tends to alter the evidence of title; and that, as to the supposed case of a drain, it was so foreign to the question before the jury, that it was not necessary to caution them on the subject. *Taddy*, therefore,

Took nothing.

DAVIS *v.* BLACKWELL, Executor.

May 29.

COVENANT. Breach, non-repair of a house demised to testator by a lease which expired in *December* 1831.

An executor who pays legacies six months after probate, cannot plead such payment in discharge of his testator's liability on a covenant.

The testator died in *March* 1829. Probate was taken out in *May* 1830, and this action was commenced in *November* 1830. The Defendant pleaded, *plenè administravit*; *plenè administravit* before notice of the covenant; *plenè administravit* before notice of breach of covenant. On which pleas issue was joined.

At the trial it appeared that the Defendant, after discharging some debts, made over the residue of the assets to the residuary legatee within six months after the date of the probate. No notice had been given to him of the state of the house in question, which had never been occupied by the testator.

A verdict having been found for the plaintiff,

Spankie Serjt. obtained a rule *nisi* for a new trial, on the ground that the Defendant was discharged by having paid over all the assests to the legatee before notice of the Plaintiff's claim. He cited *Brooking* v. *Jennings* (*a*), where, on *plenè administravit*, it was held that the Defendant might give in evidence that he was ad-

(*a*) 1 *Mod.* 174.

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DAVIS v. BLACKWELL.

ministrator *durante minore ætate*, had paid certain debts, and had delivered over the residue: and *The Governor and Company of the Chelsea Waterworks* v. *Cowper* (*a*), where it was held, that, on *plenè administravit*, the Defendant might shew he had paid over the residue to the residuary legatee, after discharging debts and legacies the year after the testator's death.

Wilde Serjt. shewed cause. The Defendant must be presumed to be aware of a lease to the testator which did not expire till after his death. If so, he was not warranted in paying legacies till he had ascertained and discharged all outstanding liabilities. At all events, payment of the legacies within six months was premature. *Brooking* v. *Jennings* only decides, that an executor *durante minore ætate* may pay over the residue to the executor who comes of age; and in *The Governor and Company of Chelsea Waterworks* v. *Cowper*, the creditor did not make his claim till thirty years after the executor had paid over the assets: after such a lapse of time, it is a presumption that even a bond has been discharged. In *Wilkins* v. *Pry* (*b*), the Master of the Rolls laid it down, "That an executor to the extent of assets is liable to be sued upon his testator's covenants, without regard to his having, or not having the possession of the lease. Even if the testator had, before his death, assigned the lease, the executor would not be the less liable to be sued upon the covenants. He cannot, by assigning it away himself, get rid of his liability to be sued. There is, therefore, a reason why he should require a covenant of indemnity, just as much as there was, why the testator himself should have required such a covenant; because, as the testator was bound by the personal covenant, the executor is bound to the extent of assets by the same covenant." The

(*a*) 1 *Esp.* 275. (*b*) 1 *Meriv.* 265.

lessor

lessor has no remedy except on his covenant, while the executor might have required an indemnity before paying the legatees. *Plenè administravit*, is a plea not established by mere payment of legacies; the Defendant must shew that they were paid in proper order; so that even a verdict for the Defendant could not have been sustained on this evidence.

Spankie. The replication raises no issue of a *devastavit*, which it should have done, if the Plaintiff meant to rely on the objection that the legacies were paid out of their due order. It is the duty of an executor to pay legacies, and the Defendant ought not to suffer for discharging that duty promptly. By the statute of distributions, 22 & 23 *Car.* 2. *c.* 10., administrators may proceed to wind up the intestate's affairs at the expiration of a twelvemonth from his death. The same practice may properly be prescribed to executors: and here the testator had been dead more than a twelvemonth before the Defendant paid the legacies. Where an executor has no notice of bonds, he is justified in paying simple contract debts. *Harman* v. *Harman.* (*a*) And the same principle ought to be applied with respect to the payment of legacies. The Defendant here received no actual notice, and he cannot be presumed to have implied notice of his testator's liability, for the testator did not occupy the house in question, and, upon assignment, the lease would pass out of his hands.

TINDAL C. J. The only question is, whether the Defendant has shewn by evidence that he has duly administered the effects of his testator; for it lies on him to shew affirmatively that he has done so, and it is not necessary for the Plaintiff to reply a *devastavit*. Now,

(*a*) 3 *Mod.* 115.

1832.

DAVIS v. BLACKWELL.

it appears that the will was proved in *May* 1830, and that after some debts had been paid, the Defendant, in *November* 1830, made over all that remained to the residuary legatee; thus allowing only six months to elapse before he so disposed of the whole of the assets. That cannot be deemed an administering of the assets in due course of law, so as to afford an answer to the Plaintiff's demand. It is not clear, indeed, that payment of legacies would in any case be an answer to a demand of a debt; for all the text books lay it down, that "*after* the payment of debts, it is the duty of the executor to pay legacies," and if he pays legacies first, he does it at his own hazard. I am not, however, prepared to say that after such a length of time as elapsed in the case of the *Chelsea Water Works Company* v. *Cowper*, the *laches* of the creditor might not be deemed a waiver of his right against the executor; it is not necessary here to decide that point: it is certain, however, that in the case of administrators, the statute 22 & 23 *Car.* 2. *c.* 10. leads us to infer that no payment of legacies would be a discharge against a claim of debt. By *s.* 8, of that statute it is enacted, "That no such distribution of the goods of any person dying intestate be made till one year be fully expired after the intestate's death; and that each and every one to whom any distribution and share shall be allotted, shall give bond with sufficient sureties in the said courts, that if any debt or debts truly owing by the intestate shall be afterwards sued for and recovered, or otherwise duly made to appear, then and in every such case he or she shall respectively refund and pay back to the administrator, his or her rateable part of that debt or debts, and of the costs of suit and charges of the administrator by reason of such debt, out of the part and share so as aforesaid allotted to him or her, thereby to enable the said administrator to pay and satisfy the said debt

debt or debts so discovered after the distribution made as aforesaid." That section leads to the inference that payment of legacies would not be a bar in an action against an administrator for a debt due from the intestate: if it would not in an action against an administrator, there is no reason why it should in an action against an executor; for, though an executor should not provide himself with a bond of indemnity, as an administrator is enjoined to do, the spiritual court would decree that the legacy should be refunded, if debts were afterwards discovered. I will not say that such a defence might not be made if the debt were claimed after a great lapse of time, but six months does not appear to me to be a reasonable time for ascertaining the existence of debts; and the legacies having therefore been paid prematurely, this rule must be discharged.

PARK J. I am of the same opinion. It is admitted that there is no case precisely in point, and perhaps that is because executors seldom pay so precipitately. But I do not agree that the twelvemonth from the time of the death pointed out by the statute of distribution in the case of administrators, affords any guide for the case of executors; for if so, an executor might defer taking out probate with a view to elude the creditor. *Brooking* v. *Jennings*, and *Harman* v. *Harman*, only decide that the executor may pay simple contract debts where he has no notice of a specialty creditor; and in a note to the case of *Harman* v. *Harman*, the editor says, the Court were of opinion, that where the payment of a simple contract debt is compulsive, it is a good payment without a notice, but not where the payment of such debt is voluntary. But in the *Chelsea Water Works Company* v. *Cowper*, Lord *Kenyon*, as to other payments, puts in a qualification, which applies expressly to this case; "Provided it be not done too precipitately;" that is the question. I think the executor has been too precipitate

1832.

DAVIS
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BLACKWELL.

cipitate in this case, and that therefore the rule must be discharged.

GASELEE J. I think the executor has been premature in paying the legacies. In the *Chelsea Water Works Company* v. *Cowper*, thirty years elapsed before the creditor preferred his claim. Without saying what is the proper time for the payment of legacies, or whether in any case the payment of them before debts can be justified, I think the payment here was too soon.

BOSANQUET J. I think the rule must be discharged. The executor is to pay specialty debts, simple contract debts, and legacies, and to pay them in that order. Cases may occur in which he may be justified in paying a simple contract debt first, because when the simple contract creditor proceeds before the executor has notice of the specialty, he cannot plead the specialty debt in bar. But the demand of a legatee stands on a different footing, because, in the language of courts of equity, he is no more than a volunteer, who cannot be satisfied till all debts are discharged. No precise time has been fixed for the payment of legacies; but in the case of the *Chelsea Water Works Company*, Lord *Kenyon* thought that after a great lapse of time the *laches* of the creditor might justify the executor in paying them, provided he was not too precipitate. With respect to administrators, they are required by the statute not to pay over the residue in less than twelve months after the death of the intestate; but that period cannot be applied to the case of an executor, so as to justify him in paying over when a twelvemonth has expired from the death of the testator, for by deferring the taking out of probate he might mislead the creditors, and give them little or no opportunity of giving notice of their claims. The real question therefore

fore is, whether or not the executor has been precipitate in paying legacies. I think he has been so in this case, and is therefore responsible to the Plaintiff.

Rule discharged.

SPARLING *v.* HADDON.

May 29.

IN an action for libel the Plaintiff alleged in his declaration that he was an attorney of the Court of King's Bench; and in proof of that allegation, after *calling* a witness who stated that he knew the Plaintiff *to have* acted as an attorney, produced the stamp office certificate of his having paid the annual duty imposed upon attornies by 37 *G.* 3. *c.* 9. This certificate was countersigned by a Master of the Court of King's Bench as having been duly entered, and a witness proved the signature of the Master, and that he discharged the duties of that office.

The Stamp Office certificate, countersigned by a Master of the Court of King's Bench, is sufficient *primâ facie* evidence to satisfy an allegation that the party is an attorney of that Court.

A verdict having been found for the Plaintiff,

Spankie Serjt. obtained a rule *nisi* for a new trial, on the ground that though the evidence above shewed the Plaintiff to be an attorney, it did not satisfy the allegation that he was an attorney of the Court of *King's Bench*, the stamp office certificate being delivered to any one who chooses to pay the tax, and the entry of it in the Court of *King's Bench* being only required to ensure such payment. The Plaintiff should have produced a certificate from the Master, or the roll of attornies. 2 *Phillips' Evid.* 243.

Wilde Serjt., who shewed cause, argued that the stamp certificate, countersigned by the Master, was sufficient

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sufficient *primâ facie* evidence that the Plaintiff was an attorney of the Court of King's Bench; for it might be presumed that the Master would not have entered it unless the Plaintiff were an attorney of that Court. He relied on *Berryman* v. *Wise* (*a*), and *Pearce* v. *Whale*. (*b*)

Spankie. In *Pearce* v. *Whale* there was sufficient evidence to satisfy the allegation, independently of the stamp office certificate.

TINDAL C. J. The present case is not sufficiently distinguishable from *Pearce* v. *Whale* to lead us to a different conclusion. In this case there was no evidence of the Plaintiff's having acted as an attorney in actions in the Court of King's Bench; but there was evidence of his having taken out the usual annual certificate at the stamp office, and that it had been countersigned by the Master of the Court of King's Bench. It was proved further, that the person who had signed as such was the Master, and that the signature was his hand-writing. And the question is, whether that was not sufficient *primâ facie* evidence to satisfy the allegation that the Plaintiff was an attorney of the Court of King's Bench. In *Pearce* v. *Whale*, indeed, there was other evidence; but the objection was, that it did not appear that the party was an attorney on the roll of the Court; and the answer to that was evidence of a series of certificates countersigned in the same manner as the present. It was then held, that though not conclusive, this was sufficient *primâ facie* evidence that the party was an attorney of the Court of King's Bench. I think, therefore, that this rule must be discharged.

The other Judges concurring,

The rule was discharged.

(*a*) 4 *T. R.* 366. (*b*) 5 *B. & C.* 38.

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BRUNSKILL *v.* GILES.

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BOMPAS Serjt., on the part of the Defendants, moved for a *venire de novo*, on the ground that the jury had been convened by the partner of the attorney for the Plaintiff.

After a trial has been had, the Court will not grant a *venire de novo*, on an allegation that the jury has been convened by the partner of the Plaintiff's attorney; at least without proof that the party who objects was not aware of the fact at the trial.

The objection had been made at the trial; but the learned serjeant not being furnished with the evidence to support it, the cause proceeded, and a verdict was found for the Plaintiff. The affidavit in support of this application did not state that the knowledge of the circumstance had come to the Defendant by surprise at the trial, or that due diligence had been then used to establish the fact; but it was now contended, that no verdict could be supported under such circumstances.

TINDAL C. J. The law has appointed a particular time for taking this objection, — when the jury come to the book to be sworn. The Defendant was not in a condition then to tender his formal challenge. I am not prepared to say that a case may not occur in which, if the party be not aware of the objection at the time, he may not afterwards come and require the assistance of the Court: but upon this affidavit there is nothing to shew that the Defendant was taken by surprise, or that he used due diligence to establish the fact at the trial.

PARK J. There is not the shadow of a pretence for this application. The cause proceeded at the trial because no ground of challenge had been established. Instead of withdrawing, the counsel for the Defendant chose to address the jury, and take his chance of a verdict:

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ness of its mistress was in effect that of an hotel keeper, to which it is not essential that a house should be known by any public sign or name, or that the guests should be furnished with provisions by the landlord. These are mere accidents of the business, which may exist with or without them. There are some acknowledged hotels, as *Warren's*, without external name or sign; and others, as the *Old Hummums*, which the guests frequent for the purpose of lodging only.

Jones. If the keeper of a private lodging-house is held subject to the bankrupt law as the keeper of an hotel, the law must include those who only let lodgings occasionally, as to barristers on a circuit. Such persons could not have been contemplated by the legislature under the designation of hotel keepers, but persons who obtain a stock of provisions upon credit. The question is, whether the profit from furnishing provisions is a principal or only an accessory object of the business. In *Patten* v. *Brown* (*a*) it was held, that a person who buys pigs or other stock with a view to a resale of them, as auxiliary to the profitable occupation of his farm, and in the interval feeds them wholly or principally on the produce of his farm, does not thereby become a trader.

TINDAL C. J. The question turns on the construction of the late bankrupt act, which for the first time has rendered subject to the bankrupt laws persons following the vocation of "victuallers, keepers of inns, taverns, hotels, or coffee houses." These words were not all intended to mean the same thing, or so many would scarcely have been employed. Nor is it necessary that we should define them all: but it is manifest

(*a*) 7 *Taunt.* 409.

that

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that the word *hotel* is not used in the sense of the old word *hostel*, for that means what is now termed an inn; and as the word *inn* immediately precedes, it could scarcely have been intended to designate the same thing by both. The modern word is introduced from the *French*, and rather implies a house to which people resort for lodging, than for the sort of entertainment which is to be procured only at an inn. The question therefore is, whether Mrs. *Roberts* was the keeper of a lodging house or hotel within the meaning of this statute. I told the jury, that if Mrs. *Roberts* sought her livelihood by a profit on the provisions she furnished to her guests, she must be deemed an hotel keeper within the meaning of the bankrupt law, and that the Plaintiff would be entitled to their verdict. The jury, by finding for the Plaintiff upon that direction, have in effect found that Mrs. *Roberts* sought her livelihood by a profit on the provisions furnished to her guests. It has been contended that I should have directed them to consider whether the profit to be derived from letting lodgings was the principal object of Mrs. *Roberts*'s business, and the profit from provisions, only accessory; or whether the profit from supplying provisions was the principal object of her business: but that distinction is not quite correct, for it would exclude the keepers of many public hotels, which are frequented by persons who require only lodging of the hotel keeper, and obtain their board elsewhere. It seems to me, therefore, that the question was left to the jury in the mode most likely to fulfil the intention of the legislature, which was to extend the protection of the bankrupt laws to those persons who supply keepers of hotels and lodging-houses with furniture and provisions.

PARK J. concurred.

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GASELEE J. There might have been some doubt if the party had only received lodgers occasionally, and had never supplied them with provisions: but here the house was open to any comer, and all who frequented it were supplied with provisions to some extent. In other matters it has always been held that an hotel keeper is subject to the same liabilities as an innkeeper.

BOSANQUET J. I am of the same opinion. It has been assumed in argument that in order to be subject to the bankrupt laws, a party must make a profit by buying and selling the principal object of his business; but many persons are specified in the statute who do not fall within that description, as bankers, wharfingers, carpenters, factors, &c. Without precisely defining the business of an hotel keeper, I think the question was properly left to the jury, and has been properly decided by them. There are many establishments of this kind in which the provisions form an inconsiderable part of the expense, a large proportion of which is occasioned by the quantity of furniture required; and the credit necessary to obtain that, was probably the reason for making the keepers of such establishments subject to the bankrupt laws. By an hotel keeper no doubt something was meant different from an inn or tavern keeper. It seems to me that the bankrupt properly came within the former description, and that this rule must be

Discharged.

1832.

PRESCOTT *v.* FLINN and Others.

May 30.

ASSUMPSIT on two bills of exchange indorsed to the Plaintiff in the name of the Defendants by *Lawrence Johnson.*

In order to shew that *Johnson* had authority to indorse for the Defendants, the Plaintiff proved that he was the Defendants' confidential clerk, and had been introduced by the Defendants to their bankers, as one to whom they were to pay the same attention as to the Defendants themselves: that the Defendants had, in repeated instances, recognised his authority to *draw* both bills and cheques by procuration for them: and that on three occasions *Johnson* had *indorsed* bills by procuration for them, on one of which occasions, at least, the Defendants must have known of the indorsement; and upon the other two the bills had been discounted by a bill-broker at the Defendants' bankers, and the Defendants had drawn out the money raised upon the bills.

The Defendants offered in evidence two letters, purporting to have been written by themselves to *Stevens*, a bill-broker, on the 2d and 14th of *July* 1830, before he had discounted the two bills on which this action was brought, for the purpose of shewing that such letters had been forged by *Johnson.* The letters, however, related to a different transaction, and were rejected by *Tindal* C. J., before whom the cause was tried; and a verdict having been found for the Plaintiff,

Coleridge Serjt. moved to set it aside as against evidence, and also on the ground that the letters to *Stevens* ought not to have been excluded.

1. From the fact that the Defendants' confidential clerk had been accustomed to draw cheques for them; that, in one instance at least, they had authorized him to indorse; and, in two other instances, had received money obtained by his indorsing in their name, a jury was held warranted in inferring that the clerk had a general authority to indorse.

2. Letters, forged by the clerk, purporting to contain an authority to indorse upon another occasion, held not admissible in evidence to shew he had no authority to make the indorsement on which the Plaintiff sued.

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Wilde and *Bompas* Serjts. shewed cause. The circumstance of the Defendants having sanctioned at least one indorsement by *Johnson*, coupled with the general confidence they were proved to have reposed in him, is sufficient to support the finding of the jury; and the letters were properly excluded, for they had no reference to this transaction, and if admitted, would only have shewn that *Johnson* had committed a forgery, not that he had forged the indorsements in question.

Coleridge. The confidence reposed in *Johnson*, by allowing him to draw bills and cheques does not assist the Plaintiff; for an authority to draw does not confer an authority to indorse; *Robinson* v. *Yarrow* (*a*), *Murray* v. *The East India Company* (*b*); and it is too much to presume a general authority from a single instance. The letters ought to have been admitted for the purpose of showing that in some instances at least *Johnson* had indorsed without authority.

The Court took time to look at the bills, and judgment was now delivered by

TINDAL C. J. Two objections have been urged in this case against the Plaintiff's right to recover: one, that the verdict was against evidence; the other, that evidence tendered by the Defendants at the trial was improperly rejected.

The first objection was, in effect, this, that the jury was not warranted in finding upon the evidence before them, that *Lawrence Johnson* had authority from the Defendants to indorse the two bills on which the action was brought, in their names.

The evidence given to prove *Johnson*'s authority to indorse bills for the Defendants was, first, the proof that

(*a*) 7 *Taunt.* 455. (*b*) 5 *B.* & *Ald.* 204.

he

he was a confidential clerk of the Defendants, and had been expressly introduced by them to their bankers, as one to whom they were to pay the same attention as they would to the Defendants themselves. Secondly, evidence was given that they had, in repeated instances, recognised his authority to draw both bills and cheques by procuration for them; bills being produced which were so drawn by him, and which afterwards bore the indorsement of the partners, and very numerous cheques, about twenty in number, having been signed by him, in his own name, by procuration of the Defendants; such cheques being signed at the Plaintiff's banking-house for sums directed to be paid under orders from country correspondents, to Messrs. *Flinn* and Co., but which cheques, it appeared, were afterwards paid into the Defendants' own bankers, so that the Defendants may be presumed to have had an opportunity of seeing how their name was used. The Plaintiff, lastly, proved, that on three occasions, *Johnson* had indorsed bills of exchange by procuration for them: on one of which occasions, at least, the Defendants must have known of such indorsement, inasmuch as after the special indorsement by him as agent of the firm, to one of the partners, the bill bore the subsequent indorsement of that partner; in the other two instances, there was certainly no such knowledge brought home to the Defendants; but the bills had been discounted by a bill broker at the Defendants' bankers, and the Defendants had drawn out the money raised upon the bills. Now, it is contended, that the two first heads of evidence proved no authority to *indorse*, but that, at the utmost, according to the distinction laid down in *Robinson* v. *Yarrow*, they proved an authority to draw; and, again, it was contended, that from the particular circumstances under which the cheques were drawn, they were, in reality, receipts for money paid by the Plaintiffs, rather

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than cheques, and entitled to little weight upon the question.

And, further, as to the instances of indorsement by *Johnson*, it is argued that the single instance of the special indorsement of the bill to the order of one of the partners, by no means imported a general authority to indorse bills, as the power over the proceeds of the bill was never parted with by the owners; and that, in the other two cases, the Defendants at this very time dispute their liability to pay their bankers, on the ground of the want of authority in *Johnson* to indorse by procuration for them. But it has not been contended, as indeed it could not, that any part of the evidence was improper to be laid before the jury, in determining whether the clerk had authority to indorse or not.

It may be admitted, that an authority to draw, does not import in itself an authority to indorse bills; but still, the evidence of such authority to draw, is not to be withheld from the jury, who are to determine on the whole of the evidence, whether such authority to indorse exists or not. The jury, although they may require some direct testimony upon the authority of the clerk to indorse, may justly be satisfied with less evidence, where it is proved that the clerk is a confidential clerk, and that he has an undisputed authority to *draw* in the name of the principals. And as well this part of the evidence, as also the direct evidence of authority to indorse, was left to the jury, with those remarks in favour of the Defendants which are now urged, and almost in the precise terms now used by the Defendants' counsel.

When, therefore, the evidence on this subject was left to a special jury of merchants, who have the right to bring their own knowledge of the general course of business in aid of their judgment on the particular occasion, and they have declared themselves satisfied that

that the Defendants have, by their conduct, shewn that this clerk had authority to indorse, with what object could we send this cause to a second trial before a jury of a similar description, where the very same question must again be left to the new jury upon the same evidence?

The second objection was, that evidence had been improperly rejected. The evidence offered by the Defendants was that of two letters purporting to be written by the Defendants to *Stevens* the bill-broker, one dated the 2d, the other the 14th of *July* 1830, and purporting to state that *Johnson* had authority to indorse bills for the Defendants. These letters the Defendants offered in evidence, for the purpose of shewing that they were forgeries. The evidence, when offered, was rejected, on the ground that it related to a different transaction with *Stevens*, prior in point of time to the discounting of the two bills on which the action is brought. And we are of opinion the evidence was properly rejected on that ground. The Plaintiffs are to stand or fall as to their right to recover, upon the proof they are able to produce of the conduct of the Defendants amounting in other instances to an authority to their clerk to indorse bills in their names. If the case prove to the satisfaction of the jury, that the Defendants authorized the clerk to indorse, how is that authority diminished or contradicted by proof, that in two instances in the preceding month, of which they had no notice, *Johnson* the clerk forged an authority to indorse? Such evidence appears to us to be wholly irrelevant to the point in dispute, whether the clerk had or had not authority to indorse *these bills* in the following month of *August*. Upon the whole, therefore, we think the verdict, which has been given for the Plaintiff, should stand; and, that the present rule for setting it aside, should be

Discharged.

1832.

May 31.

MARTYR *v.* BRADLEY.

Covenant to leave, at the end of a term, a water mill, with all fixtures, fastenings, and *improvements*, during the demise, fixed, fastened, or set up in or upon the premises, in good plight and condition, reasonable use and wear only excepted,

Held, to include a pair of new mill-stones set up by the lessee during the term, although the custom of the country authorized him to remove them.

COVENANT. The Plaintiff had by indenture demised a mill to the Defendant in the following terms:—"All that newly erected water corn-mill, with the appurtenances thereunto belonging, situate, lying, and being at *Orford*, in the county of *Kent*, then lately erected by the Plaintiff; together with the two pair of mill-stones, and the several batting-mills, machines, gear-works, running-tackle, corn, and other bins; and all other machines that were in, or affixed to and about the said water corn mill, or any part thereof; together also with a certain bran and counting-house in the said indenture particularly mentioned and described, and also a certain stable and waggon lodge therein also particularly mentioned and described; together with the banks, barks, ponds, streams, watercourses, ways, easements, profits, commodities, emoluments, advantages, and appurtenances whatsoever to the said mill, stable, waggon lodge, hereditaments, and premises belonging, or in any wise appertaining, or usually used or occupied therewith: to hold for fourteen years." The Defendant covenanted that he would keep the premises in repair; "and the said water corn-mill, stable, waggon-lodge, and other the premises thereby demised, being so well and substantially repaired, paved, scoured, glazed, cleansed, amended, and kept as aforesaid, should and would, at the expiration or other sooner determination of that demise, peaceably and quietly leave, surrender, and yield up unto the Plaintiff, his heirs or assigns, together with all locks, bolts, bars, and other fixtures, fastenings, and improvements which then were, or which should or might at any time or times during the con-

continuance of that demise, be fixed, fastened, or set up in, upon, or about the premises or any part thereof, in good plight and condition, reasonable use and wear only excepted."

The Plaintiff, in his declaration averred, that after the making of the said indenture, and during the term thereby granted, and whilst the Defendant held, occupied, and enjoyed the said demised water corn mill, and premises, with the appurtenances, as tenant thereof to the Plaintiff, under and by virtue of the said indenture, to wit, on the 1st day of *January* 1831, in the county aforesaid, the Defendant removed one pair of the said stones, with the gear and machinery belonging thereto, *which* were in and upon the said mill at the time of *making* the said indenture, and during the said term placed and set up in and upon the said mill one pair of new mill-stones, with gear and machinery belonging thereto, in the place and stead of the said pair of old mill-stones, with gear and machinery; and the said one pair of new mill-stones, with the gear and machinery belonging thereto, remained so placed and set up in and upon the said mill, in the place and stead of the one pair of old mill-stones, with gear and machinery, at the end and expiration of the said term, to the great improvement of the said demised mill, with the appurtenances; and, by reason of the premises, the said one pair of new mill-stones, with the gear and machinery belonging thereto, became and were the property of the Plaintiff as the landlord of the said demised mill and premises, and the person to whom the reversion of and in the said demised premises, with the appurtenances, expectant on the determination of the said term by the said indenture so granted, belonged, and so remained and continued until and at the time of the removal, carrying away, and conversion thereof thereinafter mentioned: that the Defendant, by the license and permission of the Plaintiff, remained in possession

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session of the said demised mill and premises, with the appurtenances, for a short time after the expiration of the said term, to wit, until and upon the 13th of *October* 1831, when he quitted the same; that during all that time, the Plaintiff was, and still is, the owner of the said demised mill and premises, with the appurtenances; that the said one pair of new mill-stones, with the gear and machinery belonging thereto, remained placed and set up in and upon the said demised mill in the place and stead of the said one pair of old mill-stones, with gear and machinery, at the time of the expiration of the said term, and after the expiration thereof, until and at the time of committing the grievance thereinafter next mentioned; yet the Defendant, well knowing all and singular the premises, but contriving and wrongfully intending to injure and aggrieve the Plaintiff, and to lessen and injure his estate and interest in the said premises, with the appurtenances, and to diminish the value of the said water corn mill, and to deprive him of the benefit and advantage of the said one pair of new mill-stones, with the gear and machinery belonging thereto, after the expiration of the said term, and whilst he the Defendant was in possession of the said demised water corn mill and premises, with the appurtenances, by the license and permission of the Plaintiff as aforesaid, to wit, on the 10th of *October* in the year last aforesaid, in the county aforesaid, wrongfully and injuriously, and without the license or consent, and against the will of the Plaintiff, removed the said one pair of new mill-stones, with the gear and machinery belonging thereto, and restored and put back the said one pair of old mill-stones, with the gear and machinery thereof, and carried away the said one pair of new mill-stones, with the gear and machinery belonging thereto, being of great value, to wit, the value of 60*l.*, from, out, and off the said water corn-mill, and converted and disposed thereof to his own use, whereby the

the said estate and interest of the Plaintiff in the said mill and premises was greatly injured, lessened, and reduced in value, to wit, at, &c. and he the Plaintiff wholly lost and was deprived of the said one pair of new mill-stones, and the gear and machinery belonging thereto.

At the trial before *Tindal* C. J., it appeared that during his term the Defendant had substituted two new *French* mill-stones, for two old ones, which he had found on the premises. The lower stone was rammed in and fixed with mortar; the upper revolved on its axis. When the Defendant quitted the premises at the end of about ten years, he took away these new stones, and *left* in their place those which he had found on *entering*. A witness stated that it was the general custom for the tenant to remove such stones.

The Chief Justice, however, being of opinion that the language of the covenant included the stones in question, a verdict was taken for the Plaintiff, with leave for the Defendant to move to set it aside.

Wilde Serjt. obtained a rule *nisi* accordingly, citing *Naylor* v. *Colling* (*a*), where it was held, that a covenant by a tenant to yield up in repair, at the expiration of his lease, all buildings which should be erected during the term upon the demised premises, includes buildings erected and used by the tenant for the purpose of trade and manufacture, only when such buildings are let into the soil, or otherwise fixed to the freehold. In the present case the upper mill-stone, at least, was moveable, and neither of them could be deemed a portion of the building demised.

Andrews Serjt. shewed cause. He contended that the stones being an essential part of the mill, an improve-

(*a*) 1 *Taunt.* 19.

ment

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ment of the stones was an improvement of the mill within the meaning of the covenant, and the rather, as the lessor would naturally desire to guard himself by contract against the custom of which evidence had been given at the trial.

Wilde. Looking at the demise, and the words which accompany the term *improvements* in the covenant, it is to be inferred that by *improvements* in the mill, the parties meant improvements of the principal and solid structure, not improvements in utensils or machinery merely accessary to the principal structure. If it applies to the stones, it must be held to apply to the straps, ropes, cornbin, and all the other chattel gear, which are uniformly deemed the property of the tenant. Renovations of detached portions of the machinery are not improvements of the mill, which, after the renovations, remains as it was before.

TINDAL C. J. The question is, what it was the intention of the parties to comprehend in the word *improvements*, and in particular whether they intended to include stones, such as those which have been put up and removed by the Defendant. The words of the covenant are, "and the said water corn-mill, stable, waggon-lodge, and other the premises thereby demised, being so well and substantially repaired, paved, scoured, glazed, cleansed, amended, and kept as aforesaid, shall and will, at the expiration, or other sooner determination of this demise, peaceably and quietly leave, surrender, and yield up unto the Plaintiff, his heirs or assigns, together with all locks, bolts, bars, and other fixtures, fastenings, and *improvements* which now are, or which shall or may at any time during the continuance of this demise, be fixed, fastened, or set up, in, upon, or about the premises, or any part thereof, in good plight and condition, reasonable use and wear only excepted." That

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That *improvements* is a word large enough to cover alterations in the working part of the mill, appears from the words "fixed, fastened, or set up in or upon the demised premises, or any part thereof." For, in looking to see what the premises are, we find them described as "*all* that newly erected water corn-mill, with the appurtenances thereunto belonging, situate, lying and being at *Orford* in the county of *Kent*, then lately erected by the Plaintiff, together with the two pair of mill-stones, and the several bolting-mills, machines, gear-works, running-tackle, corn and other bins, and all other machines that were in or affixed to and about the said water corn-mill, or any part thereof; together, also, with a certain bran and counting-house." The word must mean, therefore, whatever was fixed to the premises. These stones had been fixed for ten years; the lower one rammed in, the upper, supported on its axis. And there are other words in the covenant which shew that it is not confined to the structure or building alone: "In good plight and condition, reasonable use and wear only excepted." Now, "reasonable wear" is more likely to apply to machinery, which is the subject of wear, than to the more permanent parts of the premises. The evidence of the custom for tenants to remove stones of this kind, may account for the parties having resorted to such a covenant, to exclude any doubt on the question. It is to be observed, too, that this is the covenant of the Defendant; and it is a universal rule, that a covenant must be taken most strongly against the party making it. When we see that in *Naylor* v. *Colling* a covenant to leave all buildings in repair was held to extend to buildings which by law the defendant was allowed to remove, why are we precluded from saying that this covenant also includes improvements which, but for the covenant, the tenant might have considered his own.

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PARK J. This is purely a question as to the construction of the covenant; but *Naylor* v. *Colling* is a decision in favour of the plaintiff; for the Court held there, that erections and buildings were within the covenant, although structures not let into the soil might be removed. But these stones were clearly a part, and an essential part of the mill, and if not an improvement, why were they put there? The exception of wear and tear seems particularly applicable to mill-stones, and makes it more clear that they were in the contemplation of the parties to the covenant.

GASELEE J. I am of the same opinion. If the construction for which the defendant contends were to prevail, the lessee, after wearing out the lessor's mill-stones, might replace them with new ones, and after they had formed part of the mill for some years, remove them on quitting, leaving the landlord those which had been worn out in the tenant's service.

BOSANQUET J. I am of opinion that the plaintiff is entitled to retain the verdict, and that these stones constituted an improvement of the premises within the meaning of the covenant. That covenant contains an engagement, that the Defendant shall repair the mill and other the premises thereby demised, and leave all fixtures and improvements fixed, fastened, and set up in and about the same. These mill-stones were improvements fixed and set up in the premises.

The tenant, perhaps, was not bound to substitute other stones for the landlord, but having substituted new ones for those which were unserviceable from wear and tear, he was bound under this covenant to leave them as improvements.

Rule discharged.

1832.

SMITH *v.* SAINSBURY.

May 31.

The Court refused to set aside an award, on the ground that the parties had been examined by consent, and that subsequently to the award the Plaintiff had discovered that the Defendant was a felon convict. It appeared, however, that the judgment of the arbitrator was formed independently of the Defendant's testimony.

JONES Serjt. had obtained a rule *nisi* to set aside the award of a barrister in this cause, on the ground that subsequently to the award, which was in favour of the Defendant, it was discovered that the Defendant had been sentenced to transportation for a felony, and had returned before his time was expired.

Both parties had, by consent, been examined before the arbitrator, and *Jones* averred that the Plaintiff's counsel would not have consented to a reference on such terms if he had known of the Defendant's conviction.

Wilde Serjt. shewed cause on affidavits, by which it appeared that the Defendant had returned after a free pardon from the governor of *New South Wales*; and that the arbitrator had formed his judgment altogether independently of the Defendant's testimony. *Wilde* contended, that the Defendant's competency was restored by the operation of 30 *G.* 3. *c.* 47. and 8 & 9 *G.* 4. *c.* 83. That after decision, objections to testimony were too late; and that, at all events, the objection here was immaterial, the arbitrator having formed his conclusion independently of the testimony of the Defendant.

Jones. The objection is, that the Plaintiff would never have consented to a reference had he been aware of the Defendant's conviction.

TINDAL C. J. If the testimony of the Defendant had been the evidence on which the arbitrator proceeded, it might have been, — I do not say it would have been, — a ground for entertaining this motion; but, upon the affidavits

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affidavits it appears explicitly, that the judgment of the arbitrator was wholly independent of the Defendant's testimony. Before a jury it is very important to exclude all testimony which is not properly admissible; because a jury is not conversant with the details of evidence, or capable of discriminating very accurately between that which ought, and that which ought not to prevail on their judgment: but, an arbitrator practised in the law, has no difficulty in excluding from his judgment, statements which ought to be without effect; and as the affidavits leave no doubt that, in this case, the arbitrator abstained from giving any effect to the Defendant's testimony, the rule must be discharged.

The rest of the Court concurred, and the rule was therefore

Discharged.

STEPHENS *v.* LOWE.

Same *v.* STRICK.

May 31.

A bond conditioned for the assessment of and arbitration on the damages occasioned by the obligor's working a mine, every two months, Held to be imperative, and not merely directory, as to the periods of arbitration.

DEBT on an arbitration bond, dated the 30th of *November* 1830, the condition of which was, that the Defendants should "perform, fulfil, and keep the award, order, arbitrament, final end and determination of *Joseph Malachy* therein described, named, selected, and chosen, as well by and on the part and behalf of the Defendant and the said *Joseph Strick*, as of the Plaintiff, to arbitrate, award, judge, and determine, as well the amount of damages already or hereafter to be sustained by the Plaintiff, her heirs, executors, administrators, or

assigns,

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assigns, for or by reason of certain adits, levels, water-courses, engines, and other erections, then already or to be thereafter cut, made, and raised in, through, upon, and within the limits of a certain set or license for mining in and through a certain tenement of her, the Plaintiff, situate and being in the parish of *Calstock* therein mentioned; so that the said *J. Malachy* did make his award in writing as to all such damages therein mentioned, and compensation to be afterwards made, on or before the 20th day of *December* then next: and as to all damages to be thereafter sustained and compensation to be thenceforth made, at the expiration of every two months from the said 20th day of *December*."

Averment, that *Malachy*, at the end of the second two months, from the 20th of *December* 1830, to wit, on the 13th of *July* 1830, made an award touching the premises, and ordered the Defendant to pay the Plaintiff 24*l.* for damage occasioned by working the mine. Breach, non-payment. There was also a count for money due on an award, and on an account stated. Pleas, *non est factum; nil debet;* that *Malachy* did not make his award at the expiration of the second two months from the 20th of *December* 1830; that he did not make any award; or not till after an unreasonable time.

At the trial before *Tindal* C. J., *Middlesex* sittings after *Hilary* term, it appeared that the Defendants, in this and the other action, were, sometime previous and up to the entering into the submission for the award in question, jointly interested in a mine, in the working of which they had committed, and would continue to commit damages to the Plaintiffs' property. In order to ascertain the damages resulting therefrom, the Defendants, by their joint and several bond to the Plaintiff of the 30th of *November* 1830, submitted those damages to arbitration, with the condition that the arbitrator should make successive awards at the expiration of every two

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months from the 20th of *December* 1830. The arbitrator made his first award within the time; but the second award, upon which the Plaintiff sought to recover, was not made until the 13th of *July* 1831, instead of the 20th of *April* in that year, and, consequently, not within the time limited by the bond. It also included damages incurred subsequently to the 20th of *April*. The delay was occasioned by the request of the Defendants, who objected to the expenses attending such frequent awards as would take place, if the bond were strictly complied with by making them at the end of every two months.

Both the Plaintiffs' attorney, the Defendant *Strick*, and Mrs. *Lowe*'s agent, attended the arbitrator during the making of the award, survey, and assessment, in question. On the arbitration bond they signed a document, which was as follows: —

"*Wheal Williams Mine, April* 26th, 1830. The parties within named, by themselves or their agents, have met this day by consent, on the second assessment or award.

J. Malachy, Arbitrator.
Jas. Husband, for Mrs. *Stephens*.
J. Vivian, *Jos. Strick*, } for Mrs. *Lowe* and Mr. *Strick*."

This memorandum was not stamped.

On the part of the Defendant it was objected, that the award was not made within the time prescribed by the condition of the bond, and that the memorandum being unstamped, could not assist the Plaintiff; whereupon she was nonsuited, with leave to move to enter a verdict for 24*l*.

A rule *nisi* having been obtained accordingly,

Wilde Serjt. shewed cause, urging the objection relied on at the trial.

Jones

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Jones Serjt. in support of the rule. The award pursues the submission, which is only directory, not imperative, as to the period of two months: that period is obviously named to spare the Plaintiff the inconvenience of more frequent arbitrations; and it would have been impossible to examine the evidence and make the award at the precise moment when each two months expired.

At all events after attending the arbitrator, the parties are estopped to make the objection. *Lawrence* v. *Hodgson* (*a*), *Matson* v. *Trower* (*b*), *Wharton* v. *King* (*c*), *Leggett* v. *Finlay*. (*d*)

And the memorandum does not require a stamp, for it is not an agreement constituting a new submission, but a mere attestation of the fact of attendance.

TINDAL C. J. The first question is, whether this award can be sustained under the terms of the submission bond. The condition of the bond is, that the parties shall abide by the award of the arbitrator on the premises, so that the arbitrator make his award as to all damages to be thereafter sustained, and compensation to be thenceforth made, at the expiration of every two months from the 20th of *December*.

It has been urged that this condition is merely directory, and being for the benefit of the Plaintiff, he is at liberty to waive it: but it is equally a condition for the benefit of the Defendants, for it was important to them that the periodical assessment of damages should be made as soon as possible after the alleged injury, in order that they might be secure of evidence to shew the real state of the facts: and as to the supposed difficulty of making the award at the precise moment each two months should expire, in this as in other cases a reason-

(*a*) 1 *Young & Jer.* 16.
(*b*) 1 *Ry. & M.* 17.
(*c*) 2 *M. & M.* 96.
(*d*) 6 *Bingh.* 255.

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able time must be allowed for the duty to be performed, and what shall be a reasonable time must depend on the facts of the case and the judgment of the Court. Though it is not always easy to say what is a reasonable time, it is easy, as in the present instance, to say what is unreasonable; for where the party has allowed a third month to elapse without requiring an assessment, and has included in the award damages incurred subsequently to the second month, that is a proceeding not within the condition of the bond, and, therefore, as to the bond, entirely void. That brings us to the second question, whether the award can be supported under any parol authority. Now the indorsement on the bond is, in effect, a written agreement substituting one time for another: "The parties within named, by themselves or their agents have met this day by consent on the second assessment or award;" that is, the parties in the bond; and the assessment, that which was to have taken place every two months. What is this but an agreement to substitute *July* for *April?* At all events it is evidence of an agreement to that effect, and the words of the stamp act are wide enough to comprehend such an instrument. "Agreement, or any minute of memorandum of an agreement, whether the same shall be only evidence of a contract, or obligatory on the parties from its being a written instrument." (*55 G. 3. c.* 184.) Then, the instrument not being stamped, the Plaintiff is out of Court.

PARK, GASELEE, and BOSANQUET Js. concurred.

Rule discharged.

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(IN THE EXCHEQUER CHAMBER.)

GURNEY *v.* GORDON and Another.

June 2.

(In Error.)

An action for costs, incurred in opposing a petition against the return of a member of parliament, may be brought against one of several petitioners, under 9 *G.* 4. *c.* 22.

DEBT. The Plaintiffs below declared that the Defendant below (*Gurney*) was indebted to the Plaintiffs under and by virtue of a certain act of parliament made and passed in the ninth year of the reign of his late Majesty *George* IV. to consolidate and amend the laws relating to the trial of controverted elections or return of members to serve in parliament, in the sum of 1260*l.* 10*s.* 8*d.* for the costs and expenses incurred by the Plaintiffs in opposing the petition of the said Defendant and one *Charles King*, Esq., complaining of an undue election and return for the borough of *Tregony*, and to be paid by the said Defendant to the Plaintiffs when he, the Defendant, should be thereunto afterwards requested; whereby, and by reason of the said last-mentioned sum of money being and remaining wholly unpaid and by virtue of the said act, an action had accrued to the said Plaintiffs to demand and have of and from the said Defendant the sum of 1260*l.* 10*s.* 8*d.* parcel of the sum demanded. Counts for money paid, money lent, money had and received by Defendant below to the use of Plaintiff below, and upon an account stated. Judgment upon *nil dicit*, with a remittitur *damna* except as to 1260*l.* 10*s.* 8*d.*

By the fifty-seventh, sixtieth, and sixty-third sections of the statute referred to in the declaration (9 *G.* 4. *c.* 22.) it is enacted, "That whenever any committee ap-

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pointed to consider the merits of any petition complaining of an undue election or return, or of the omission to return any member or members to parliament, shall report to the house with respect to any such petition (except as is hereinbefore excepted), that the same appeared to them to be frivolous or vexatious, the party or parties, if any, who shall have appeared before the committee in opposition to such petition, shall be entitled to recover from the person or persons, or any of them, who shall have signed such petition, the full costs and expenses which such party or parties shall have incurred in opposing the same, which costs and expenses shall be ascertained in the manner hereinafter directed." (Section 60.) "The costs and expenses of prosecuting or opposing any petition presented under the provisions of this act, and the costs, expenses, and fees which shall be due and payable to any witness summoned to attend before such committee, or to any clerk or officer of the House of Commons, upon the trial of any such petition, shall be ascertained in manner following; that is to say, on application made to the Speaker of the House of Commons within three months after the determination of the merits of such petition, by any such petitioner, party, witness, or officer, as before mentioned, for ascertaining such costs, expenses, or fees, the Speaker shall direct the same to be taxed by two persons, of whom the clerk, or one of the clerks assistant of the House shall always be one, and one of the following officers, not being a member of the House, shall be the other; that is to say, masters in the High Court of Chancery, clerks in the Court of King's Bench, prothonotaries in the Court of Common Pleas, and clerks in the Court of Exchequer; and the persons so authorised and directed to tax such costs, expenses, and fees shall and they are hereby required to examine the

the same, and to report the amount thereof, together with the party liable to pay the same, to the Speaker of the said House, who shall upon application made to him, deliver to the party or parties a certificate signed by himself, expressing the amount of the costs, expenses, and fees allowed in such report, together with the name of the party liable to pay the same; and such certificate, so signed by the Speaker, shall be conclusive evidence of the amount of such demands, in all cases and for all purposes whatsoever; and the witness, officer, or party claiming under the same, shall, upon payment thereof, give a receipt at the foot of such certificate, which shall be a sufficient discharge for the same." (Section 63.) "It shall and may be lawful for the party or parties entitled to such costs and expenses, or for his, her, or their executors or administrators, to demand the whole amount thereof, so certified as above, from any one or more of the persons respectively who are hereinbefore made liable to the payment thereof in the several cases hereinbefore mentioned; and in case of nonpayment thereof, to recover the same by action of debt in any of his majesty's courts of record at *Westminster*; in which action it shall be sufficient for the plaintiff or plaintiffs to declare that the defendant or defendants is or are indebted to him or them in the sum to which the costs and expenses, ascertained in manner aforesaid, shall amount by virtue of this act; and the certificate of such amount, so signed as aforesaid by the Speaker, shall have the force and effect of a warrant to confess judgment; and the Court in which such action shall be commenced shall, upon motion, and on the production of such certificate, enter up judgment in favour of the plaintiff or plaintiffs named in such certificate for the sum specified therein to be due from the defendant or defendants in such action, in like manner

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as if the said defendant or defendants had signed a warrant to confess judgment in the said action to that amount."

Archbold, for the Defendant below, contended that as it appeared on the record the petition had been instituted by *Charles King* as well as by the Defendant below, the action should have been brought against them jointly, and not against *Gurney* alone: that *Gurney* being compelled by the statute to suffer judgment by default, had no opportunity of taking this objection except on error.

Sed per Curiam. By the fifty-seventh section the party who shall have appeared before the committee in opposition to the petition is entitled to recover from the person or persons, or *any of them*, who shall have signed the petition, the full costs and expenses incurred in opposing the same; and by the sixty-third, to demand the whole amount thereof from any *one* or more of the persons liable. It is impossible to doubt that the Plaintiff may, if he chooses, confine his suit to one.

Judgment affirmed.

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DOE dem. JOSEPH MANTON *v.* AUSTIN and PLOMER.

June 5.

The acts of occupiers during their occupation are, even after their occupation has ceased, evidence against the parties under whom such occupiers came into possession.

THE lessor of the Plaintiff sued as the administrator of *David Betson*, surviving trustee under the will of *John Aitkens*.

Aitkens, who died in 1794, bequeathed to *Betson* and another, as trustees for his daughters, certain leasehold premises which he held by indenture from *Mark Bell* for a term of sixty-six years, commencing in *November* 1773.

By a codicil to his will, *Aitkens*, after reciting the above bequest, and that he had in *March* 1793 mortgaged the premises to *John Veysey* for 500*l.*, directed that in case the 500*l.* should remain charged upon the premises at the time of his death, the trustees under his will, who were also his executors, should immediately pay off the mortgage out of any other property that should come to their hands, it being his intention that the premises should continue vested in the trustees in trust for his daughters.

In 1807 the trustees underlet the premises to *Catharine Fairfield* for a term which expired at *Christmas* 1826. Mrs. *Fairfield*, some time before the expiration of her underlease, assigned it to *Thrupp*; and *Thrupp*, at the expiration of the underlease, 25th of *December* 1826, delivered the possession of the premises to the defendant *Plomer*, who put in an occupier, and, with *Austin*, now defended as landlord.

At the trial before *Park* J. the lessor of the Plaintiff produced the probate of *Aitkens'* will, stamped with a heavy probate duty; proved *Aitkens'* possession of the property in question; his death; the death of the trustees named

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named in his will; and the administration to the effects of the survivor: next, he put in the counterpart of the lease from *Bell* to *Aitkens*, the Defendants, after notice, having failed to produce the original lease, which was in their possession. Then *Thrupp*, who appeared to be in the interest of the Defendants, and failed upon a *subpœna duces tecum* to produce the under-lease assigned to him by Mrs. *Fairfield*, after prevaricating as to the existence or destruction of that instrument, was allowed to state that he had paid rent for the premises to the lessor of the Plaintiff upon an under-lease assigned to him by Mrs. *Fairfield*, which expired at *Christmas* 1826, till within about six months before its expiration; and that on the 9th of *December* 1826 he refused to pay the lessor of the Plaintiff the rent due at the preceding *Michaelmas*, referring him to the Defendant *Plomer* for the reason. Mrs. *Fairfield* proved her own occupation under the demise from *Betson* and his co-trustee; payment of rent to *Betson*, and after his death to the lessor of the Plaintiff; and the sale of the under-lease to *Thrupp*. *Betson* had received the rent from 1794.

On the part of the Defendant it was objected,

First, that the original lease from *Bell* to *Aitkens* ought to have been produced, or that the lessor of the Plaintiff should have shewn what had become of it before he produced the counterpart;

Secondly, that the lessor of the Plaintiff should have shewn that the mortgage mentioned in the codicil to *Aitkens*'s will was paid off;

Thirdly, that the under-lease from *Betson* and his co-trustee to Mrs. *Fairfield* ought to have been produced; and,

Fourthly, that Mrs. *Fairfield* and *Thrupp* being no longer in possession under the demise from *Betson* and his co-trustee when *Plomer* entered the premises, their

acts

acts and declarations ought not to be taken as evidence against the Defendants.

A verdict, however, was given for the Plaintiff, which *Taddy* Serjt. obtained a rule *nisi* to set aside on the above objections.

Wilde and *Bompas* Serjts. shewed cause. From the language of the codicil to *Aitkens*'s will, and the length of time which has elapsed, coupled with the fact that *Aitkens*'s devisees have been in the receipt of rent from 1794 to 1826, it may be presumed that the mortgage has been paid off. And if the Defendants take under *Thrupp* they, as well as *Thrupp*, are estopped to say that the lessor of the Plaintiff, whom *Thrupp* by payment of rent has acknowledged to be his landlord, had not a good title, either in respect of the mortgage or the non-production of the original lease from *Bell*. But the Defendants take under *Thrupp* or nobody; and *Thrupp* having disclaimed the lessor of the Plaintiff as his landlord on the 9th of *December* 1826, before the expiration of the lease under which he had paid rent to the lessor of the Plaintiff, the case cannot be distinguished from *Doe d. Knight* v. *Lady Smythe* (*a*), where it was held that a third person could not defend as landlord upon the trial of an ejectment if it appeared that the tenant in possession came in as tenant to the lessor of the Plaintiff, paid rent to him, and then disclaimed, although the term for which he came in had expired before the ejectment. The lease under which *Thrupp* occupied having expired, it may be presumed to have been destroyed, and secondary evidence of its contents was admissible after *Thrupp*'s testimony on his *subpœna duces tecum*.

(*a*) 4 *M.* & *S.* 347.

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Taddy, and *Andrews* Serjt. with him, endeavoured to distinguish the present case from *Doe d. Knight* v. *Smythe*, and contended that, at all events, the principle of that case ought not to extend to the acts of tenants who had been so long out of possession as *Thrupp* and *Fairfield*; otherwise there was no limit to the effect of such acts short of twenty years; a decision which would be productive of great inconvenience and confusion.

And *Thrupp*'s testimony should not have been received without proof of further enquiry for the expired under-lease. At all events, it appearing on the evidence produced by the lessor of the Plaintiff himself that the legal title to the premises was in *Veysey* under the mortgage, it should have been shewn that that mortgage had been paid off; for the objection is not here made by a tenant or one claiming under him, to the title of his landlord; but is disclosed by the landlord himself, who fails therefore to shew a title on which he can recover.

TINDAL C. J. I think this rule ought to be discharged. It is not necessary for us to decide whether the lease from *Bell* to *Aitkens* ought to have been produced, for it appears that rent has been paid by a succession of tenants, under whom the Defendants claim, to the personal representative of *Aitkens*'s devisee, who could only claim in respect of a leasehold interest; and with respect to the mortgage disclosed in the codicil to *Aitkens*'s will, such evidence, on whichever side produced, is open to the same degree of consideration with respect to its concomitant circumstances, such as the presumptions arising from lapse of time or otherwise. Here the codicil itself contains express directions that the mortgage shall be called in; a large stamp appears on the probate; and none but the representatives

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sentatives of the testator have interfered with the property since 1793. I admit that these circumstances are not conclusive; but unanswered by any evidence of a mortgage now in existence, they afford a strong presumption that the money has been paid, particularly against the Defendants who claim under a lease granted by the devisees of the mortgagor. Then, as to the admission of *Thrupp*'s testimony, the lease under which he occupied having expired may fairly be presumed to have been destroyed; at all events, upon his failing to produce it upon a *subpœnâ duces tecum*, and prevaricating with respect to its existence, the learned Judge was warranted in letting in the secondary evidence. That brings us to the main question, whether the Defendants who come in under *Thrupp* can be permitted to dispute the title of his lessor. The principle is that a tenant shall not contest his landlord's title; on the contrary, it is his duty to defend it. If he objects to such title, let him go out of possession. But it is urged that *Thrupp*'s admissions were made six years ago, and it is asked, how far back are such admissions to be evidence against a subsequent claimant? I answer, as far back as the tenant has admitted himself to be in under the landlord who comes forward to assert his title.

I think, therefore, that the Defendantsare bound by the acts of *Thrupp*, and that this rule must be discharged.

GASELEE and ALDERSON Js. expressed a similar opinion, and PARK J. referred to the language of *Dampier* J. in *Doe d. Knight* v. *Smythe*, as conclusive on the point, — "The tenant in possession paid rent to the lessor, and then disclaimed. But he ought to give back the possession to the lessor, and after that the Defendant may have her ejectment. It has been ruled after that neither

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the tenant, nor any one claiming by him, can controvert the landlord's title. He cannot put another person in possession, but must deliver up the premises to his own landlord. This, I believe, has been the rule for the last twenty-five years, and I remember was so laid down by *Buller* J. upon the Western circuit."

Rule discharged.

June 6.

GARLICK, Assignee of LEE, a Bankrupt, *v.* SANGSTER and Another.

An insolvent's petition is said to be *filed* when it reaches its place of final custody, and not when it first comes to the hands of the officer of the court.

ASSUMPSIT for money had and received by Defendants to Plaintiff's use. At the trial before *Littledale* J., *York* Spring assizes 1831, a verdict was found for the Plaintiff, subject to the opinion of the Court on the following case: —

The Plaintiff was the assignee of the estate and effects of *William Thompson Lee*, a bankrupt; the Defendants were creditors of the said bankrupt, and had received from him a warrant of attorney, dated the 7th of *October* 1829. Judgment was afterwards entered up, and execution sued out on the same. The sheriff levied on the 13th of *October* 1829; the sale of the property was begun on the 26th of *October*; and continued on the 27th, 28th, and 29th of *October*. The officer sold on the 26th of *October* to the amount of 180*l.* 1*s.* 11*d.*; on the 27th of *October*, to the amount of 394*l.* 7*s.* 8*d.*; and on the 28th of *October*, to the amount of 415*l.* 3*s.* 9*d.* He paid out of the proceeds 26*l.* for king's taxes without authority from the Defendants; and on the 26th of *October*, gave the Defendants a cheque, dated that day, for 180*l.*; a cheque on and dated the 27th of

of *October*, for 300*l.*; a cheque on and dated the 28th of *October*, for 150*l.*; a cheque on and dated the 29th of *October*, for 350*l.*; and, on the same day, paid to the Defendants 40*l.* in cash.

The sales began each day at eleven, and finished at half-past two. The three first days sales amounted to 989*l.* 13*s.* 4*d.*, and on the morning of the 29th, the sheriff had only to sell 31*l.* to complete the amount of levy. By twelve or half-past twelve o'clock in the forenoon, the sheriff had sold about 35*l.*, and by one o'clock 150*l.*

The cheques, dated the 26th, 27th, and 28th of *October*, were not presented or paid till the 31st of *October*, and the cheque dated the 29th of *October* was not presented or paid till the 3d of *November*, but all were duly honored. The officer had not funds in the bankers' hands till the 30th of *October*. Goods were sold on the 26th and 27th of *October* to the amount of 100*l.* on credit, and were not paid for till after the sale was closed.

The trading, act of bankruptcy, and petitioning creditor's debt were proved. The commission was dated the 24th of *November* 1829. The act of bankruptcy was a petition by the bankrupt to the insolvent court for his discharge; it was dated the 28th of *October* 1829, but was not signed by the bankrupt till after four o'clock in the afternoon of that day. An assignment of his property to the provisional assignee of the insolvent court was executed in prison at the same time. After signing the petition, the bankrupt had nothing more to do with it, and it remained in the custody of the officer of the insolvent court. Mr. *Dance*, the officer, took the petition and assignment away with him, and brought it into the office the next day, the 29th, about two o'clock in the afternoon; and, in answer to the question, When was the

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the petition filed? said, he could not answer the question, but would state the practice of the Court. That after it is signed, it is carried to the public office in *Lincolns' Inn Fields*, attested, numbered, and handed to the officer of the town department, with whom it remains. That, in this case, he did not return to the office on the 28th of *October* after the petition was signed; and, in consequence of the number of petitions, and the business occasioned thereby, he did not get to the office the following day before two o'clock, and could not, in consequence of the numerous petitions, have numbered and attested it before the 30th of *October*, when it was handed to the officer of the town department, with whom it has remained since. The bankrupt was never discharged under the insolvent debtors' act.

The case was argued on several grounds, but the decision of the Court turns entirely upon the time of filing the petition; as to which

Spankie Serjt., for the Plaintiff, contended that the creditor having by the act of signing the petition done all that the statute requires on his part, it must be taken to be filed when he has delivered it, so signed, into the hands of the officer of the Court. In that sense, therefore, the petition was filed on the 28th, prior to the completion of the execution on which the Defendant relies. Attestation is not necessary to the validity of such an instrument; *Com. Dig. Faits*; and the duty of the officer of the Court to place it in a proper custody is independent of the act required by the legislature on the part of the creditor, namely, placing the petition duly signed in the hands of the officer. From the decision in *Rex* v. *Wade* (*a*) it may be inferred that the rules of a friendly

(*a*) 1 *B. & Adol.* 861.

society

society are filed within the meaning of 33 G. 3. c. 54. when they are placed in the hands of the clerk of the peace.

Wilde Serjt. *contrà*. The petition is not filed till it has reached a place of legal custody where it may be accessible to public search. As far as the discharge of the creditor's duty is concerned, it may indeed be deemed to be filed when placed in the hands of the officer; but to defeat the rights of others, it is not filed till by being placed in a permanent custody it becomes a record of which the public has notice; as, of the *issuing* of a commission by its passing the great seal. *Ex parte Ereeman* (*b*), *Watkins* v. *Maund*. (*c*) In *Rex* v. *Wade* the question as to *filing* was not decided.

TINDAL C. J. It is unnecessary to give an opinion on much that has been urged in argument. On the construction which I put on the act of parliament, the act of bankruptcy was not complete till the 29th of *October* at two o'clock, when *Dance* took the proceedings to the office where they were to be filed; but the sale under the execution was complete by twelve o'clock on that day. The words in section 13. of the act are, "That the filing of the petition of every person in actual custody, who shall be subject to the laws concerning bankrupts, and who shall apply by petition to the said Court for his or her discharge from custody, according to this act, shall be accounted and adjudged an act of bankruptcy from the time of filing such petition." And it is urged that the instrument was virtually filed as soon as *Dance* had it in his possession. But it is manifest, on this case, that *Dance* was not the person in whose custody it was to remain, for

(*a*) 1 *F. & Beames*, 34. (*b*) 3 *Campb*. 308.

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after such an instrument is signed *Dance* says, it is carried to the public office in *Lincoln's Inn Fields*, attested, numbered, and handed to the officer of the town department, with whom it remains. So that he does not consider it filed till it is carried to the office and delivered there. The case of *Rex* v. *Wade* has been referred to. All that the Court says in that case is, that in the construction of 33 *G.* 3. *c.* 54. "filing must be understood to mean depositing for the purpose of being filed, the society doing all that is incumbent on them;" but the instrument here cannot be said to be filed until it arrives at its destination.

PARK J. *Filing* means putting in the proper place of deposit, and *Dance* was not the officer with whom this instrument was to have been deposited. So when affidavits are filed at a Judge's chambers, the placing them in the hands of the clerk does not complete the deposit in the place of legal custody, and till they arrive there they are not filed.

GASELEE J. Two o'clock on the 29th is the earliest time at which this instrument can be said to have been filed, and that renders it unnecessary to give an opinion on any other point in the case.

BOSANQUET J. I am of the same opinion. The sheriff had completed his levy by twelve o'clock on the 29th, and the question is, whether the act of bankruptcy was before or after that time, for when the amount of the debt has been levied, the debtor is discharged. The 7 *G.* 4. *c.* 57. *s.* 10. directs, "That it shall be lawful for any person who shall be in actual custody, to apply by petition in a summary way to the said Court, for his or her discharge from such custody, according to the provisions of this act. And such prisoner

soner shall in such petition pray to be discharged from custody, and to have future liberty of his or her person against the demands for which such prisoner shall be then in custody, and against the demands of all other persons who shall be or claim to be creditors of such prisoner at the time of presenting such petition; which petition shall be subscribed by the said prisoner, and shall be forthwith filed in the said Court." Having, therefore, so directed that the petition shall be subscribed, it directs in section 13. that the filing shall be an act of bankruptcy. But it cannot be considered that filing and subscribing are the same thing. The provisional assignee goes to the prison to obtain the signature of the insolvent, but he is not to have the custody of the instrument, which cannot be said to be filed till it becomes a record of the Court. As that did not take place till after the sale under the execution, our judgment must be for the Defendant.

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Judgment for Defendant.

RICHARDSON *v.* TOMKIES and Another.

June 6.

IN *replevin*, the Defendants, as bailiffs, made cognizance for the arrears of an annuity of 120*l.* due to the personal representative of *Isaac Blackburne*, under a deed

1. To a cognizance for the arrears of an annuity, the Plaintiff pleaded that a memorial of all the deeds, &c. by which the annuity was granted, the names of the witnesses, the consideration, &c. was not enrolled in the Court of Chancery: the Defendants replied that a memorial of all the deeds, &c., the names of the witnesses, the consideration, &c. was enrolled; and after setting out the memorial at length, concluded with a *prout patet per recordum*, and verification thereon: Held sufficient, on demurrer alleging that the conclusion should have been to the country.

2. A judgment on a warrant of attorney being one of the securities, and the judgment being referred to, as entered up, Held, that it need not be set forth in the memorial.

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executed by *James Akers*, *April* 5th, 1808; by which [after reciting the contract for the annuity; that *Akers* had given a bond, bearing date *January* 5th 1808, in the penal sum of 2000*l.*, conditioned for the payment of the annuity; and had executed a warrant of attorney, of even date with the bond, to confess judgment for 2000*l.*, under which warrant judgment had been entered up of record against *Akers* of *Hilary* term 1808; that *Blackburne* had sold and transferred 1900*l.* 19*s.* 9*d.* 3 per cent. reduced annuties at the Bank of *England*; that such sale had produced the clear sum of 1200*l.*; and that it had been agreed, the annuity should be secured not only by the bond, warrant of attorney, and judgment, but also by an assignment of the premises, in which, &c., and issuing and payable thereout, and out of the rents and profits thereof,] it was witnessed, that in consideration of 1200*l.* then paid, and in performance of the above contract, *Akers* had granted, bargained, and sold to *Blackburne*, his executors and assigns, an annuity of 120*l.* charged upon the premises, in which, &c. with power of distress.

The Plaintiff pleaded, 1st, *non est factum*; 2dly, that no memorial of the said supposed indenture in the said cognizance lastly mentioned, containing the names of all the witnesses, and the names of the persons for whose lives the said supposed annuity was granted, and the consideration of granting the same, was enrolled in the High Court of Chancery within twenty days of the execution of the said last-mentioned indenture. 3dly, that a memorial of every deed, bond, instrument and assurance, whereby the said supposed annuity or rent-charge was granted, within twenty days after the execution thereof, was not enrolled in the High Court of Chancery, according to the provisions of the act of parliament made and passed in the seventeenth year of *George* III.

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The Defendants joined issue as to the first plea; and to the second replied, that a memorial of the said indenture was, within twenty days of the execution thereof, to wit, on the 13th of *April* 1808, duly enrolled in the High Court of Chancery, in pursuance of the statute in that case made and provided: and which said memorial was as follows, — (Setting out the deed at length, with its recitals of the bond, warrant of attorney, and judgment, and the names and address of the witnesses,) — as by the said memorial remaining duly enrolled in the said High Court of Chancery at *Westminster*, more fully appeared. And the Defendants further said, that the said memorial did duly contain the names of all the witnesses, the names of all the persons for whose lives the said annuity was granted, and the considerations of granting the same, in manner and form as in and by the statute in that case made and provided, was required, as by the said inrolment of the said memorial, remaining of record in the said High Court of Chancery at *Westminster* aforesaid, more fully appeared: and this they, the said Defendants, were ready to verify by the said record.

To the third plea they replied, that a memorial of every deed, bond, instrument, and assurance, whereby the said annuity or rent-charge, mentioned in the indenture in the said cognizance lastly mentioned, was granted, within twenty days of the execution thereof, to wit, a memorial of the said writing obligatory and warrant of attorney in the said last-mentioned indenture mentioned, was, to wit, on the 13th of *April* 1808, duly enrolled in the High Court of Chancery, in pursuance of the statute in that case made and provided; which said inrolment was as follows, — (Setting out the bond and warrant of attorney at length,) — as by the said memorial remaining duly enrolled in the said High

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Court of Chancery at *Westminster* aforesaid more fully appeared. And the Defendants further said, that the said memorial did duly contain the month and year when the said writing obligatory and warrant of attorney in the said cognizance mentioned bore date, and the names of all the parties, and for whom any of them were trustees, and of all the witnesses; and did truly set forth the annual sum or sums to be paid, and the name of the person and persons for whose life or lives the said annuity was granted, and the consideration and considerations of granting the same, in manner and form as in and by the statutes in that case made and provided is required; as by the said enrolment of the said last-mentioned memorial remaining of record in the said Court of Chancery at *Westminster* more fully appeared: That a memorial of the indenture last mentioned in the cognizance was, within twenty days of the execution thereof, to wit, on the 13th of *April* 1808, duly enrolled in the High Court of Chancery, in pursuance of the statute in that case made and provided; and which said memorial was as follows, — (Setting out the indenture of the 5th of *April*, with the names and address of the witnesses, as before,) — as by the said last-mentioned memorial, which was enrolled in the High Court of Chancery, would, when produced, appear: And that the said last-mentioned memorial did duly contain the day of the month and year when the said last-mentioned indenture in the said cognizance mentioned, was executed, and the names of all the parties, and for whom any of them were trustees, and of all the witnesses; and did duly set forth the annual sum to be paid, and the name of the person and persons for whose life or lives the said annuity was granted, and the consideration and considerations of granting the same, in manner and form as in and by the statute in that case made and provided is required: as by the said enrolment

ment remaining of record in said Court of Chancery at *Westminster* more fully appeared; and this, &c.

The Plaintiff demurred to the replications to the second and third pleas, assigning for cause, that the said replications concluded with a verification by the record to be tried in such manner as the Court should direct, whereas divers matters of the said replications were properly matter of fact triable by a jury, and not matter of record; that is to say, whether or not the names of all the parties, and for whom any of them were trustees, and of all the witnesses, were truly stated in the supposed memorials mentioned in those replications; and whether the said supposed memorials did truly set forth the annual sum to be paid, and the name of the person or persons for whose life or lives the said annuity was granted, and the considerations for granting the same; and, therefore, the Plaintiff could not take an issue on any of those facts to be tried by the country, &c.

Joinder.

Wilde Serjt., in support of the demurrer. The pleas ought to have concluded to the country; for the object of the legislature was, that all the deeds relating to an annuity should be enrolled; *Crowther* v. *Wentworth* (*a*), *Cummins* v. *Isaac* (*b*), *Steadman* v. *Purchase* (*c*), *Harris* v. *Stapleton* (*d*), *Ex parte Ansell* (*e*): and whether *all* have been enrolled, is a matter of fact to be tried by the country. But the memorial, as set out, is ill; for it discloses that one of the securities, the judgment, was not enrolled; and it appears that, in *January* 1808, the consideration for the annuity was not the same as in *April* 1808; for, in *January*, it was a bond and warrant of attorney; in *April*, a judgment instead of the war-

(*a*) 6 *B.* & *C.* 366.
(*b*) 8 *T. R.* 183.
(*c*) 6 *T. R.* 737.
(*d*) 7 *T. R.* 205.
(*e*) 1 *B.* & *P.* 62.

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rant: so that the second consideration set forth is inconsistent with the first, and the first was not enrolled within the twenty days required by the statute.

Merewether Serjt., *contrà*, was stopped by the Court.

Tindal C. J. The first question arises on a point of form. The Plaintiff, by one of his pleas in bar, alleges, "that no memorial of the indenture in the cognizance mentioned, containing the names of witnesses, the consideration, &c., was, within twenty days, enrolled in the Court of Chancery." In answer, the Defendants set out the memorial, and begin their replication by saying "that a memorial of the indenture was, within twenty days, enrolled in the Court of Chancery in pursuance of the statute in that case made and provided; and which said memorial is as follows:" — If they had relied on a mere denial of the allegation in the plea, it would not have been sufficient: they were bound to set out the memorial: and at the end they add, — "As by the said enrolment of the said memorial remaining of record in the said High Court of Chancery more fully appears; and this they are ready to verify by the said record." It has been objected that they ought not to have concluded to the record; but we think there is no valid objection to the form they have pursued. Suppose in an action of *assumpsit* a plea of judgment recovered for the same cause action, with the usual conclusion, — "as by the record and proceedings thereof, still remaining in the said court, more fully and at large appears;" the Plaintiff may waive the issue on the record, and reply, that the judgment was not recovered for the identical cause of action; or, if that appears, demur. In *Hitchin* v. *Campbell* (*a*) it was held, on demurrer, that a judgment

(*a*) 2 *W. Bl.* 779. 3 *Wils.* 240.

for

for the Defendant in trover was not pleadable in bar to an action for the value of the same goods, it not appearing that the question was the same.

The second objection is, that the statute of 17 *G.* 3. *c.* 26. has not been complied with; and that the memorial does not state the real nature of the transaction, inasmuch as there is a difference between the consideration and security disclosed by the deed of *January* 1808, and that disclosed by the deed of *April*. Now, the statute enacts, that "every such memorial shall contain the day of the month and the year when the deed, bond, instrument, or other assurance bears date, and the name of all the parties, and for whom any of them are trustees, and of all the witnesses:" so that a party is not called on to shew the whole of the transaction, but to enrol every instrument regarding it: and the objection is answered by the case of *Buckeridge* v. *Flight* (*a*), where it was held, that if the names of all the witnesses to a deed be inserted in a memorial, that is sufficient, without specifying the parties by whom the deed was executed in their presence: and *Abbott* C. J. said, "It is not required that there should be a memorial *of the transaction*, but of the instrument whereby the annuity is granted and secured."

That brings us to the third objection, that there is no memorial of the judgment. Does the act require that? "A memorial of every deed, bond, instrument, or other assurance, whereby any annuity or rent charge shall, from and after the passing this act, be granted for one or more life or lives, or for any term of years, or greater estate, determinable on one or more life or lives, shall, within twenty days of the execution of such deed, bond, instrument, or other assurance, be enrolled in the High Court of Chancery; and every such memo-

(*a*) 6 *B.* & *C.* 49.

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rial shall contain the day of the month and the year when the deed, bond, instrument, or other assurance bears date, and the name of the parties, and for whom any of them are trustees, and of all the witnesses:" — words which evidently point to securities *inter partes*. A judgment, too, being matter of record, does not require those precautions against secrecy which the legislature has provided for transactions attended with less notoriety: and, in the form of memorial given by the statute, the word judgment does not appear. The memorial, however, in the present case recites, that judgment has been entered up; and if it be necessary to include the judgment in the memorial, it may be a question, whether it is not sufficiently done by such a reference. In *Ranger* v. *Earl of Chesterfield* (*a*) it was held, that if a bond and warrant of attorney and indenture be made to secure an annuity, the memorial of the bond and warrant of attorney need not express for whose life the annuity was granted, if it be expressed in the memorial of the indenture which recites the bond and warrant of attorney, for whose life the annuity was granted. Therefore, upon the third objection, our judgment must also be for the Defendants.

PARK J. The statute of 17 *G.* 3. *c.* 26., which, in this respect, coincides with the 53 *G.* 3. *c.* 141., requires that every deed, bond, or other instrument shall be enrolled: and it may fairly be presumed that if the legislature had intended to include judgments, they would have been specified first, as the higher security. The memorial, too, is to be enrolled within twenty days; and it may often happen that the parties may not be able to enter up judgment within that time. Added to this, no mention is made of judgments in the form of

(*a*) 5 *M.* & *S.* 2.

memorial

memorial given by the statute; and the provision as to the names of witnesses seems to point the enactment to instruments *inter partes*. The case, therefore, is not to be distinguished from *Sherson* v. *Oxlade* (*a*), where it was held that if a bond and warrant of attorney to confess a judgment be given to secure an annuity, and the judgment be entered up before the memorial is registered, the judgment need not be inserted in the memorial, under the 17 *G.* 3. *c.* 26. And Lord *Kenyon* said, " This is not one of the assurances which the legislature intended should be enrolled. The contract for the annuity was made by giving the bond and warrant of attorney to enter up judgment. Those were the securities on which the party relied; and the act is complied with by registering all the securities given by the parties. This will sufficiently answer the purpose of notoriety; and every person may see, by referring to the memorial, that the plaintiff was at liberty to enter up judgment whenever he pleased. If the memorial had been made immediately after the execution of the bond and warrant of attorney, the judgment could not have been inserted in it. Then, whether a matter shall or shall not be registered, cannot depend on an act which is to be done afterwards."

GASELEE J. I am of the same opinion. The Plaintiff, if the fact were so, might have rejoined that there were other deeds besides those mentioned in the memorial set out upon the replication.

BOSANQUET J. This is like a plea of judgment recovered, in which the Plaintiff may, if his case requires it, waive the issue on the record, and dispute the fact that the cause of action was the same. The question

(*a*) 4 *T. R.* 824.

here

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here is, whether the annuity granted by the deed of *April* 5. 1808, appears to have been duly enrolled; and it seems to me that the memorial, as set out, is sufficient. The bond and warrant of attorney have been enrolled, as well as the deed of grant, and I think it was not necessary to enrol the judgment; for the deed recites that it had been entered up; it was therefore accessible to enquiry; and it was not the intention of the legislature to compel a memorial of that which had already the sanction of publicity.

Judgment for the Defendants.

June 7.

STEWARD *v.* WOLVERIDGE.

An assignee who takes from a lessee leasehold premises by indenture indorsed on the lease, "subject to the rent reserved in the lease;" is liable in covenant to the lessee for rent which the lessee has been called on by the lessor to pay after the assignee has assigned over.

THE Plaintiff declared that in 1819, one *John Easthope* by indenture demised certain premises to the Plaintiff for twenty-one years from *March* 25, 1820, yielding and paying certain rent which the Plaintiff covenanted to pay; that the Plaintiff entered; and by an indenture of the 22d of *May* 1821, sealed with the seals of the Plaintiff and Defendant, and indorsed on the indenture of lease from *Easthope* to the Plaintiff, the Plaintiff for and in consideration of a certain sum of money, to wit, the sum of 65*l.* to him paid by the Defendant, bargained, sold, assigned, transferred, and set over to the Defendant, his executors, administrators, and assigns, as well the said indenture of lease as also all and singular the premises, with the appurtenances demised by the said indenture of lease, or expressed or intended so to be, and all the estate, right, title, interest, term of years then to come and unexpired, property, possession, claim, and demand whatsoever, either at law

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or in equity, of him, the Plaintiff, of and unto the said premises, by virtue of the said indenture of lease or otherwise howsoever; to have and to hold the said lease, together with the said premises by the same demised, or intended so to be, and by the said assignment assigned unto the Defendant, his executors, administrators, or assigns, from the 28th of *May* then instant, for and during all the rest, residue, and remainder of the said term of twenty-one years granted by the said indenture of lease, then to come and unexpired, subject nevertheless to the payment of the yearly rent, and to the performance of the covenants and agreements reserved and continued in the said indenture of lease; and he, the said Defendant, then and there accepted the said assignment, and by virtue thereof he, the said Defendant, afterwards and during the said term granted by the said indenture of lease, to wit, on, &c. entered into and upon all and singular the said demised and assigned premises, with the appurtenances, and became and was possessed thereof for the rest, residue, and remainder then to come and unexpired of the said term of twenty-one years granted by the said indenture of lease, subject to the payment of the rent, and performance of the covenants reserved and contained in the said indenture of lease: and although the Plaintiff had always observed, performed, and fulfilled all things in the said indenture of lease and in the said indenture of assignment contained, on his part and behalf to be observed and fulfilled, he, the Plaintiff, in fact said that the Defendant did not nor would after the said assignment, and during so much of the said residue and remainder of the said term of twenty-one years granted by the said indenture of lease, as had elapsed since the said assignment, and since he, the Defendant, became possessed of the said demised premises, with the appurtenances, by virtue thereof, well and

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and truly or in any manner pay, or cause to be paid, the said rent reserved and made payable by the said indenture of lease, and according to the true intent and meaning of the said indenture of assignment, and which he thereby covenanted to pay, and ought to have paid as aforesaid, but, on the contrary, wholly neglected, omitted, and refused to pay divers large sums of the rent aforesaid, to wit, the sum of *5l. 5s.* of the rent aforesaid, which became due and payable under and by virtue of the said indenture of lease, and the said covenant of the Plaintiff in that behalf therein contained, for one quarter of a year of the said term ending on the 25th day of *March* 1831, &c. By reason and in consequence whereof the Plaintiff, as the original lessee of the said premises with the appurtenances so demised and assigned as aforesaid, was called upon and required to pay, and was forced and obliged to pay, and had paid the said several sums to the said *John Easthope*, who was then lawfully entitled to, and had good, legal, and sufficient right, title, power, and authority to demand, recover, have, and receive the same, to wit, at, &c.

The Defendant pleaded that before the said several sums for the rent aforesaid in the declaration mentioned, or either of them, became due and payable as in the said declaration above alleged, to wit, on the 4th day of *November* 1822, by a certain indenture then and there made between the said Defendant, of the one part, and one *George Cæsar Foley*, of the other part, the said Defendant duly assigned the said demised premises, and all his estate and interest therein, to the said *J. C. Foley*, his executors, administrators, and assigns, to have and to hold the same, to wit, from the day and year last aforesaid, for the remainder of the said term; by virtue of which said assignment *J. C. Foley* afterwards, and before the said several sums, or either of them, became due and payable, to wit, on, &c. entered and became possessed

possessed of the said demised premises, and of all his, the said Defendant's, estate and interest therein; and that, the Defendant was ready to verify, &c.

Demurrer and joinder.

Wilde Serjt. in support of the demurrer. The Defendant having taken the premises by assignment for the residue of a term of twenty-one years, "subject to the rent reserved in the lease," has by express contract subjected himself to the payment of that rent during that term: for no precise form of words is essential to an express contract: it is sufficient if the intention of the parties plainly appears. In cases where an assignee has been discharged from payment of rent after assignment over, there has been no express contract between him and the lessor, or assignor, and the only connection between them, privity of estate, has been determined by the assignment. *Chancellor* v. *Poole*. (*a*)

Burnett v. *Lynch* (*b*), has established that where a party takes *subject to certain covenants*, he is bound to the performance of those covenants; and a contract to that effect once created, endures as long as the term. In *Jones* v. *Hill* (*c*), where it was held that waste did not lie against the assignee for not repairing to the extent the lessee had covenanted to repair, the attention of the Court was not called to the true ground on which the Plaintiff's case rested. The case was not put on the ground that a duty had arisen.

Coleridge Serjt. *contrà*. This was only an implied, not an express covenant; and if so, the Defendant's liability is only co-extensive with his possession. That such has been the general understanding, appears from the practice of requiring from assignees an express

(*a*) *Dougl.* 764. (*b*) 5 *B. & C.* 589. (*c*) 7 *Taunt.* 392.

contract

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contract indemnifying the assignor during the whole term. *Staines* v. *Morris.* (*a*) And *Burnett* v. *Lynch* affords an argument in favour of the Defendant. For if the liability of the defendant in that case had been the same after as during his possession, it would have been unnecessary to prove that the breaches took place during his possession; and *Best* C. J. said at the trial, that in order to maintain the action, it was necessary for the plaintiff to aver in the declaration, and prove at the trial that the defendant was assignee during the time when some breach of duty was committed.

That upon an implied covenant, such as "yielding and paying," and the like, a party is only liable during the continuance of his estate or interest, appears from all the authorities, because such a covenant arises on privity of estate only. *Thursby* v. *Plant* (*b*), and the authorities cited in note 6: *Bachelor* v. *Gage* (*c*), *Swan* v. *Stransham.* (*d*)

Wilde. In *Burnett* v. *Lynch* the assignment was by deed-poll, and not by a deed *inter partes* indorsed on the original lease and referring to it, as in the present case. The words "to hold the premises *subject* to the rent reserved in the indenture of lease," amount to an express covenant. The assignee by joining in the deed, admits that such are the terms on which he consents to take the premises.

TINDAL C. J. The question in this cause arises on the construction of a deed under the seal of the Defendant, executed by the Plaintiff as the assignor, and the Defendant as assignee of a lease which the Plaintiff held from *John Easthope.* If we look to the situation

(*a*) 1 *Ves. & B.* 8.
(*b*) 1 *Wm. Saund.* 241. *b.*
(*c*) *Sir W. Jones*, 223.
(*d*) *Dy.* 257. *a.*

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of the parties, there is every reason from their relation to each other, and from the Plaintiff's responsibility under the lease, that he should wish for what was equivalent to an indemnity against any claim on the part of the original lessor: the question is, whether the words he has employed are sufficient to carry that intention into effect: but we must look to the intention on both sides, and, therefore, consider whether the assignee proposed to accede to such a stipulation: and there can be no doubt, that had he been called on, he would have done so by express terms. If he had continued in possession, he could not have questioned his liability to the Plaintiff; and if he parted with his possession to a stranger, he might have protected himself by requiring an indemnity: there is no reason, therefore, why he should have objected to give the Plaintiff an express indemnity; and that brings us to the words of this instrument, by which the Plaintiff assigned the premises and his term therein "subject to the payment of the yearly rent, and to the performance of the covenants and agreements reserved and contained in the indenture of lease."

That these words import an agreement, is clear from the case of *Burnet* v. *Lynch*, in which, although the question was as to the form of action, it was distinctly held that words to the same effect as those which are found in this instrument, did import an agreement. It has been answered, that in that case the possession of the assignee continued, and an expression of *Best* C. J. has been relied on, that "In order to maintain the action it was necessary for the plaintiff to aver in the declaration, and to prove on the trial, that the defendant was assignee during the time when some breach of duty was committed." That expression, however, applied to the form of action, which was case for a breach of duty cast on the Defendant by his occupation of the premises,

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and not covenant for the neglect of an agreement pointing out a specific period of liability.

It comes then to the single question, what was the meaning of the parties here. The Plaintiff begins by assigning the premises to the Defendant, to have and to hold them, "subject to the payment of the yearly rent, and to the performance of the covenants and agreements reserved and contained in the indenture of lease." I am unable to put any other construction on these words than that they import an assent on the part of the Defendant that he will perform all the covenants in the original indenture of lease. Upon referring to that lease, to see what the covenants are, we find them to be covenants to pay rent, repair, &c. during the whole term. *Verba relata inesse videntur.* The words, therefore, "during the continuance of the term," must be considered as inserted in the assignment by reference to the original lease; and the Defendant is liable, not upon an implied, but an express covenant, to perform the covenants in the original lease during the continuance of the term.

PARK J. It is impossible to doubt the intention of the parties to create a covenant; the words are clear, and stipulations like this have often been construed as express covenants, when such appears to have been the intention of the parties.

GASELEE J. *Burnett* v. *Lynch* is a decisive authority in favour of this action. If it rested on *Chancellor* v. *Poole* alone I should have had some doubt, because there the assignee of a term declared against as such, upon a deed poll, was holden not liable to the lessor for rent accruing after he had assigned over, though it had been stated that the lessor was a party who executed the assignment, and agreed thereby that the term, which was determinable at his option, should be absolute.

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BOSANQUET J. I am of opinion that the plaintiff is entitled to maintain this action, and that this is an express covenant. It is true, the obligation is to pay rent to a third person; but though rent cannot be reserved to a stranger, a party may covenant to pay it to a stranger. In *Deering* v. *Farrington* (*a*), *Hales* C. J. said, "If I will make a lease for years, reserving rent to a stranger, an action of covenant will lie by the party for to pay the rent to the stranger." This is a deed *inter partes*, and in *Chancellor* v. *Poole*, where the assignment was by deed poll, Lord *Mansfield* said, "The question is, whether the plaintiff is a contracting, or merely an assenting party, in the deed poll;" however, if our decision were to depend on that case there might be some doubt, because the deed there, in addition to the word *paying*, which the Plaintiff treated as a covenant, contained the word *indemnifying*, to which it may be thought the judgment of the Court also applies.

Upon the question whether the expression *paying rent* constitutes an express or an implied covenant, there is abundant authority to shew that the words "*yielding and paying*," constitute an express covenant. *Helier* v. *Casbard* (*b*) *Staines* v. *Morris* shews the opinion of Lord *Eldon*, that the situation of parties connected as those in this suit, is one which calls for a covenant rendering the assignee liable during the term; but it is not to be inferred that he thought the assignee discharged, unless he were bound by an express covenant to indemnify. It is difficult to draw a distinction between *yielding and paying* and *holding, subject to a rent* to be paid.

Judgment for the Plaintiff.

(*a*) 1 *Mod.* 113. (*b*) 1 *Sid.* 266.

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June 8.

M'NEILL *v.* REID.

1. Damages may be recovered upon an agreement by one of several partners to introduce a stranger into the firm, although the agreement be entered into without the knowledge of the firm.

2. It is a sufficient consideration for such an agreement, that the stranger will become a partner.

THE two first counts of the declaration stated, that the Plaintiff was in the naval service of the *East India* Company; that certain persons had promised him the command of a ship to be chartered by the company, an appointment of great value, from which the Plaintiff would have derived considerable profit; that, in consideration he would relinquish this appointment, the Defendant, who carried on business as a rope-maker in partnership with *S. Galilee* and *J. Louch*, promised and undertook that the Plaintiff should be received as a partner into the said trade with the Defendants *Galilee* and *Louch* the *Christmas* following, and should have a certain share, to wit, one-fourth of the profits, the Defendant being then entitled to one-half, and, in the mean time, should have a commission of 2*l.* a ton upon all orders he should procure for rope and cordage. Averment that the Plaintiff relinquished the command of the ship that had been promised to him; but that the Defendant would not procure him to be taken as a partner in the said business.

The third, fourth, fifth, and sixth counts stated in substance, that in consideration the Plaintiff, at the request of the Defendant, would enter into partnership with the Defendant, *Galilee*, and *Louch*, at the end of the then current year, and in the mean time would exert himself to procure orders for rope, the Defendant undertook, at the end of the year, to take him as a partner with the Defendant, *Galilee*, and *Louch*, and to give him a certain share of the profits, to wit, &c. Averment, that the Plaintiff exerted himself to procure orders for rope, &c. and was ready and willing, and offered to become

come partner. Breach, that the Defendant would not procure him to be taken as a partner pursuant to his engagement.

The seventh and subsequent counts stated in substance that, in consideration, the Plaintiff, at the request of the Defendant, would enter into partnership with the Defendant in his share and proportion of the said business at the end of the year, and in the mean time would exert himself to procure orders, &c., the Defendant promised to take the Plaintiff as a partner in the said business, and to give him a certain share, to wit, half of the Defendant's share in the said business. Averment of the Plaintiff's exertions as before, and of his willingness and offer to become such partner. Breach, refusal of the Defendant to take him as such partner.

At the trial before *Tindal* C. J., it appeared that the Plaintiff had been offered the command of an *East India* ship for a double voyage, if he would take, at the owner's price, from one to four shares in the ship; that the value of such a voyage to the captain was not less than 1000*l.*, and that the Defendant, a friend and kinsman of the Plaintiff, was well acquainted with this fact; that the Defendant, who carried on the rope business in partnership with *Galilee* and *Louch*, as the Plaintiff knew, and whose interest was one half of the whole concern, had induced the Plaintiff to relinquish his prospect of the command offered to him as above, by promising to admit him at the ensuing *Christmas*, in the room of *Muspratt*, who had retired, to a partnership in the rope business, of which the Plaintiff was to have one-fourth, undertaking in the mean time to procure as many orders as he could; that the Defendant afterwards refused to fulfil his promise, alleging that the Plaintiff had disappointed him as to the extent of orders he had engaged to procure.

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The jury having found a verdict for the Plaintiff, with 500*l.* damages,

Coleridge Serjt. moved for a nonsuit, or a new trial on several points reserved at *Nisi Prius*.

First, as to the first and second set of counts, that an action could not lie on the contract to take the Plaintiff into partnership; it being a contract the Defendant had no right to enter into without the consent of his partners; a contract too indefinite to be carried into effect; the amount of interest to be transferred, and the duration of the proposed partnership ought at least to have been specified. In *Figes* v. *Cutler* (*a*), it was holden that an action could not be supported for breach of an agreement to become a partner generally, without proof of the specific terms of the intended partnership.

Secondly, the Plaintiff could not recover on the last set of counts, because the evidence showed the intention of the parties to be, that the Plaintiff should be a member of the general firm in the room of *Muspratt*, who had retired; and not a sub-partner with the Defendant.

Thirdly, that the damages were excessive, and that the jury had not been correctly instructed how to estimate them. A rule *nisi* having been granted,

Wilde Serjt. shewed cause. If the defendant had not the consent of his partners to introduce a new member into the firm, he ought not to have entered into such an engagement; but having entered into it, he must take the consequences of not carrying it into effect. It is usual and lawful to covenant for the acts of others; and if the party covenanting cannot secure the performance of those acts, he must make a recompense in damages.

(*a*) 3 *Stark. N. P. C.* 139.

As

As to the alleged uncertainty of the contract, the Defendant being actually engaged in a partnership business, and having himself a certain share of it, there was nothing indefinite in his engaging to admit the Plaintiff to a fourth. In *Figes* v. *Cutler* the partnership did not exist to which the Defendant pretended to introduce the Plaintiff; and though a contract may be of a nature which a court of equity will not enforce by a decree for specific performance, it does not follow that a party may not have incurred and be entitled to recover damages in a court of law for breach of the contract. In *Peacock* v. *Peacock* (*a*), a father established in business, on his son's coming of age, told him he should have a *share* in it, and held him out to the world as his co-partner. The son acted as such for several years; but there was never any thing settled as to the particular share which he should have. Under these circumstances it was held, the law would consider that there was a partnership between the parties, as well as with respect to strangers; and that it should be referred to a jury to say to what share he was reasonably entitled.

With regard to the damages, they are low, considering the Plaintiff's abandonment of an appointment which was proved to be worth more than 1000*l*.

Coleridge. The present case cannot be distinguished in principle from *Figes* v. *Cutler*. The Defendant might have rendered the contract nugatory, by taking the plaintiff into partnership and dissolving the partnership the next day; for which reason it could not be enforced in equity; *Hersey* v. *Birch* (*b*), *Vansandau* v. *Moore* (*c*), *Kinder* v. *Taylor* (*d*), *Crawshay* v. *Maxwe* (*e*); and upon

(*a*) 2 *Campb.* 45.
(*b*) 9 *Ves.* 357.
(*c*) *Gow on Partn.* 94. 96. 110.
(*d*) *Id.*
(*e*) 1 *Swanst.* 495.

 a contract

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a contract so nugatory, damages cannot be recovered. There is no criterion by which the jury could estimate the damage sustained by refusal to admit the Plaintiff to a partnership from which he might have been dismissed by dissolution the next day.

TINDAL C. J. Three objections have been made to the Plaintiff's right to retain his verdict: — First, that no action lies on the contract disclosed by the evidence in this cause: and that objection divides itself into two considerations, — one, that the Plainiiff was aware of the fact that other persons were already in partnership with the Defendant, consequently that the Defendant could not, without the consent of such persons, force a stranger into the firm; and that the Plaintiff cannot seek to enforce a contract which at the time he knew to be impossible. But this is no answer in the mouth of the Defendant; for he should have secured the consent of his partners before he ventured to enter into such a contract; or is bound, at all events, to obtain it afterwards. And actions are not infrequent where a party has engaged for the performance of an act which depends on the will of others. In *Lloyd* v. *Crispe* (*a*) it was held that if the vendor of a lease, in which was a covenant not to assign, contract to assign his interest, it is incumbent on him, and not on the purchaser, to procure the lessor's license for the assignment. It is not clear, indeed, that the Plaintiff was aware of the existence of the difficulty. He was a stranger, and without the means of knowing facts with which the Defendant was fully acquainted: and his suspicions, if he entertained any, were lulled by the language of the Defendant's agent. In the cases referred to, the contract was illegal within the knowledge of both parties.

(*a*) 5 *Taunt.* 249.

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The other point for our conderation under this head of objection is, that the contract is too vague, too uncertain as to the term of partnership, amount of capital to be contributed, and the like, to be the subject of estimate by a jury. But is that a correct statement of the evidence? It is plain that the Plaintiff considered, and that the Defendant led him to consider, that he was contracting for a fourth part of the Defendant's business, in the room of *Muspratt*, who had quitted it; and that both the Defendant and his agent, *Carstairs*, knew the precise extent and value of such an interest. That being so, the case is clear of the difficulty which arose in *Figes* v. *Cutler*, where the evidence was too indistinct to enable the jury to come to any conclusion. It is unnecessary to advert to the cases in equity, because this is not a proceeding to enforce performance of a contract, but to obtain damages for the breach of it.

The second objection is, that the consideration for the contract has been incorrectly stated in the declaration. I should have had some difficulty on the first and second counts, where the promise as to the command of the ship is stated to have been absolute, when, in fact, it was conditional, on the Plaintiff's taking a share in her. But it is not necessary to confine the Plaintiff to those counts, since it was a sufficient consideration for the contract that the Plaintiff would, as stated in other counts, become a partner.

With respect to the third objection, as to the manner in which the question of damages was left to the jury, I told them that there was some difficulty as to the amount of damages, but they might see that the Plaintiff considered the engagement as equivalent to an *East Indian* voyage, because he would not otherwise have relinquished that voyage; and the Defendant could not have estimated it at less, because he made his offer as a friend

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of the Plaintiff. If, under such circumstances, the Plaintiff gave up, what, at a very low estimate, the jury found to be worth 500*l*., there is no ground for our being dissatisfied at the amount of the verdict.

PARK J. said, that for private reasons he abstained from delivering any opinion.

GASELEE J. There is nothing unusual in parties covenanting for the acts of others; as when a lease is assigned, with a covenant that the lessor shall join in or confirm the conveyance. The Defendant, therefore, having undertaken that the Plaintiff should be admitted a partner, was bound to take such steps as should induce the firm to acquiesce, and if he failed, was answerable for their refusal; at all events, there could be no objection to his taking the Plaintiff as a sub-partner in the Defendant's share. *Figes* v. *Cutler* is distinguishable from the present case, for there no partnership subsisted at the time of the contract, to which the Plaintiff could be admitted. The interposition of courts of equity is regulated by their discretion under the circumstances of the particular case, and the party is not precluded from seeking to recover damages for the breach of a covenant, although it may be such as a court of equity might not deem it expedient to enforce. As to the damages in this case, although there was difficulty in determining the amount, I think the jury had sufficient materials for the verdict they have found.

BOSANQUET J. I think this verdict ought not to be disturbed. It is objected, that the contract is of such a nature that the Defendant could not perform it without the consent of his partners; but that does not discharge the Defendant from his contract, for he ought not to have engaged in it unless he had secured that consent, or

or was willing to incur the consequences; as where a party undertakes to sell a lease which he cannot assign without the consent of the lessor, it is his business to procure such consent: at all events, with respect to his own share the Defendant was independent of his partners; and though it may be true that equity would not interfere to enforce a partnership which the partners might dissolve the next day, that does not authorize the Defendant to break the contract. In *Hersey* v. *Birch* Lord *Eldon* says, "It is extremely difficult specifically to perform such a covenant as this, even admitting that damages could be recovered at law." In *Figes* v. *Cutler* it did not appear what the nature of the interest was in respect of which the plaintiff sought to recover damages, and the contract itself was too indefinite for the jury to decide on. But here the Plaintiff was to have one half of the interest vested in the Defendant, at the ensuing *Christmas*, and that is an interest sufficiently certain to sustain an action. It is by no means an uncommon arrangement, that in certain events one of several partners shall be at liberty to introduce a new member to the firm.

As to the damages, the direction to the jury was proper, and they were estimated according to what the jury thought was the value of the contract. The value of the *East India* voyage has not been recovered as special damage, but has been taken as an ingredient for estimating the value which each of the parties set on the contract in dispute.

Rule discharged.

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June 8.

KERRISON and Another *v.* DORRIEN and Others.

B. after marriage having made a settlement on his wife, obtained from the trustees the title deeds of the property settled, and deposited them with a banker as a security for money advanced:

Held, that the banker was not a purchaser within the 27 *Eliz. c.* 4. *s.* 2. and that the trustees were entitled to recover the deeds.

BY a postnuptial settlement, *Bainbridge* conveyed to the Plaintiffs, as trustees for his wife, certain property, the title-deeds of which he afterwards obtained from the trustees, and deposited with the Defendants as a security for money advanced.

In trover for these deeds, the Plaintiffs having obtained a verdict,

Spankie Serjt. moved for a new trial, on the ground that this conveyance was void as against a purchaser, and that the Defendants must be deemed purchasers within the 27 *Eliz. c.* 4. *s.* 2., which enacts, that "every conveyance of any lands made for the intent and of purpose to defraud and deceive such person or persons as have purchased in fee simple, fee tail, for life, lives, or years, the same lands so formerly conveyed shall be deemed to be utterly void."

Sed per Curiam. The Plaintiffs have a right to this verdict in a court of law. Upon the deposit of the deeds the Defendants acquired no more than a right to go into a court of equity to compel a legal conveyance. The language of the statute clearly specifies a purchaser; and how can we say that upon a mere deposit of deeds, entitling the party, perhaps, to apply to a court of equity, he becomes, in the language of the act, a purchaser either in fee simple, fee tail, for life, lives, or years?

Rule refused.

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BAGSTER *v.* ROBINSON.

June 14.

A person who lets out types and men to print a newspaper is not the printer within the meaning of 38 *G.* 3. *c.* 78.: the party who hires the types and superintends the printing, is the person responsible to the Stamp Office.

THE Plaintiff declared for goods sold; work, labour, and materials; and for money paid by him to the use of the Defendant.

His particulars of demand were a charge of 366*l.* 5*s.* for "composing and printing" certain numbers of a weekly newspaper called *The Christian Advocate*, and 7*l.* 10*s.* for composing, printing, and distributing certain cards.

The Defendant paid 8*l.* into court for printing the cards, and as to the residue, pleaded the general issue.

At the trial before *Tindal* C. J., it appeared that the Plaintiff had a printing-office at No. 14. *Bartholomew Close*; that the Defendants were proprietors of *The Christian Advocate*, and that one *Stevens*, on their behalf, made arrangements with the Plaintiff for printing the paper. *Stevens* was to use the Plaintiff's types and men at a certain price for every thousand papers. Upon these terms the work was printed in the Plaintiff's office, *Stevens* superintending, and, as he said, doing the part which belonged to a printer to do, in which no other person interfered. *Stevens*, who lived in *Red Lion Court*, was named as the printer at the end of the newspaper, and had filed an affidavit at the stamp-office that he was the printer, publisher, and proprietor of the newspaper called *The Christian Advocate*, which was intended to be printed at the printing-office belonging to him at No. 14. *Bartholomew Close*.

The 38 *G.* 3. *c.* 78. *s.* 1 and 2. enacts, that no person shall print or publish a newspaper without delivering to the commissioners of stamps an affidavit, specifying "the real and true names, additions, descriptions, and places

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places of abode of all and every person and persons who is and are the printer and printers, publisher and publishers of the newspaper or other paper mentioned in such affidavit or affidavits; and of all the proprietors of the same, if the number of such proprietors, exclusive of the printer and publisher, does not exceed two; and, in case the same shall exceed that number, then of two of such proprietors, exclusive of the printer and publisher."

It was objected on the part of the Defendant, that if *Bagster* were the printer, he had been guilty of an illegal act in printing a newspaper without delivering to the commissioners of stamps the affidavit required by the statute; and, consequently, was precluded from suing; and it was left to the jury to find for the Defendant, if they thought *Stevens* was not the printer. A verdict, however, was found for the Plaintiff, which

Jones Serjt. obtained a rule *nisi* to set aside on the above objection.

Wilde Serjt., who shewed cause, contended that the Plaintiff, by furnishing types and men, was the printer to whom the Defendants were responsible for the work done, though *Stevens*, who superintended and directed the work, was properly the person responsible to the stamp-office. The object of the 38 *G.* 3. was not to render liable every person concerned in the printing of a newspaper, but to be secure of the principal editor or proprietor.

Jones. According to that construction, the real printer may always elude responsibility, and the intention of the legislature be defeated. The Plaintiff was either printer or not printer: if he was printer, the illegality of his conduct was a bar to his recovery; if he was not printer, but only let out his types and men to *Stevens*,

Stevens, the evidence does not support the particular of demand, which is for composing and printing, and not for the hire of types.

TINDAL C. J. The only question for the Court is, whether, upon the evidence given at the trial of this cause, it appears so clearly that *Stevens* was not and that *Bagster* was the printer of the work in question, that we are bound to give validity to the objection which has no reference to the merits of the case. The evidence was, that *Bagster* had a printing-office in *Bartholomew Close*, and that, for the purpose of this work, *Stevens* hired a portion of his presses and men; and if upon this evidence an objection had been taken at the trial that the declaration contained no count for the hire of types and men, I should probably have directed a nonsuit. However, the objection taken was, that *Bagster* being the printer, he could not recover, because he had not complied with the directions of the 38 *G.* 3. *c.* 78. Now, according to the evidence, *Stevens* was clearly the printer responsible under the act of parliament; he alone directed and superintended the work, and hired men, who were set apart for the purpose. How could the Court or jury say upon that, that *Bagster* was the ostensible printer? The conductor of a periodical work may, and frequently does, hire the whole of a printing-office for a day, in case of accident or extraordinary pressure of matter; and if he may hire the whole, why not a part? I give no opinion upon the question as to what shall be deemed a sufficient compliance with the requisition of the statute, because *Bagster* has not so clearly been proved to have been the responsible printer as to render it necessary for us to defeat his claim by yielding to this objection on a collateral point; and as to the objection on the bill of particulars, the object of such particulars is, by disclosing the subject-matter of the suit, to prevent a surprise

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surprise on the Defendant, and not to enable the Defendant to entrap the Plaintiff and defeat his claim, by objecting to a slight variance which could have occasioned no mistake. No doubt the particular here designates as "work and labour," that which would have beeen more properly described as "hire;" but the objection was not presented at the trial, and the Court ought not to yield to it now.

PARK J. Upon this evidence *Bagster* could not be deemed the printer responsible to the stamp-office within the meaning of the act of parliament. In every view of the case, *Stevens* was the printer called upon to conform with the provisions of the act. No doubt the declaration and particular would have been more correct, if they had contained a demand for the use and hire of types and men; but that objection was not taken at the trial. It is impossible to say that the Defendant has been misled; and the Plaintiff, therefore, is entitled to retain his verdict.

GASELEE J. It is impossible to say, on this evidence, that *Bagster* would have been liable to the penalties imposed by the 38 *G.* 3. *c.* 78.; and the other objection comes too late, not having been presented at the trial.

BOSANQUET J. The objection being *strictissimi juris*, and altogether beside the merits, the Defendant must be confined to the points taken at the trial; and the only question is, whether we can see that the jury was clearly wrong in finding that *Stevens* was the printer.

It is not denied that *Stevens* conducted the work and superintended the printing; and if the names of all who have a hand in such a concern are to be entered at the stamp-office, it would follow that the tradesmen who supply materials must also be included. The legislature could

could not have proposed to go to that extent, and therefore I am not prepared to say that the verdict of this jury is wrong. The objection to the form of the declaration and the bill of particulars was not taken at the trial; besides, the object of the particular is, by disclosing the general nature of the Plaintiff's demand to prevent a surprise on the Defendant; and it is not necessary that it should be drawn up with all the strictness and precision of a declaration.

Rule discharged.

ADAMS *v.* BROWN.

June 15.

Before applying to the Court to compel a party to give security for costs, application should be made to the party.

COLERIDGE Serjt. had obtained a rule *nisi* for the Plaintiff to give security for costs, on the ground that he had assigned all his effects for the benefit of his creditors, and that he had no beneficial interest in the result of this action.

Adams Serjt., who shewed cause, objected, that no application had been made to the Plaintiff for security; upon which

Coleridge said, that *Bass* v. *Clive* (*a*), which decided that such an application is necessary, had been overruled by subsequent decisions (*b*); but

The *Court* said, that as this rule was, in effect, for a stay of proceedings, the better practice was, that it should be preceded by an application to the party; and the decisions being conflicting, the rule was

Discharged.

(*a*) 3 *M.* & *S.* 283.
(*b*) See *Baillie* v. *De Bernales*, 1 *B.* & *Ald.* 331.

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June 15. **BELCHER and Others, Assignees of MABERLY, a Bankrupt, *v.* JOHN SMITH.**

A party who, by his own act, is placed in a situation to be sued, cannot call on the Court to substitute another defendant under the interpleader act, 1 & 2 *W.* 4. *c.* 58.

UPON Mr. *Maberly's* marriage, 15,000*l.* had been invested in consols by his wife's father, in the name of the Defendant and other trustees, in trust to pay *Maberly* the dividends during his life; remainder over to the wife and issue of the marriage.

From the time of the marriage till 1829, these dividends had been received and regularly paid over to *Maberly* by a banking firm, in which the Defendant was a partner.

In 1829 *Maberly* assigned his interest in the dividends to his son in law, *George Robert Smith*, the nephew of the Defendant.

In *January* 1832 *Maberly* became bankrupt, and the Defendant, at the request of his nephew, went to the bank of *England*, himself received the half-yearly dividend on the 15,000*l.*, for the first time, and, instead of placing it in the firm of which he was a member, to the account of *Maberly* or *George Robert Smith*, entered it in a book where the firm kept an account of sums for which they had no specific appropriation. *Maberly's* assignees, impeaching the validity of the assignment to *George Robert Smith*, had sued the Defendant for the amount of this dividend, when

Taddy Serjt. obtained a rule *nisi* under the interpleader act, 1 & 2 *W.* 4. *c.* 58., calling on the Plaintiffs to exonerate the Defendant, who had no interest in the affair, and to try the question with *George Robert Smith*.

Wilde

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Wilde and *Spankie* Serjts., who now shewed cause, contended that the Defendant had unnecessarily interposed by receiving the dividends at the request of his nephew, and to serve his nephew's interests; that, therefore, he was not entitled to a relief which it was in the discretion of the Court to concede or withhold.

Taddy, (*Jones* and *Coleridge* Serjts. were with him,) urged that the Defendant, as a trustee for *Maberly*, was responsible for the dividend, and therefore justified in receiving it. He had acted for his own protection, and being a trustee, could not be deemed a volunteer.

TINDAL C. J. The act of parliament is not compulsory, but authorizes the interposition of the Court at its discretion upon proper occasions; and our duty is, to see that the party applying for the exercise of our discretion, has not voluntarily put himself into the situation from which he calls on the Court to extricate him. The words of the statute are, " That upon application made by or on the behalf of any defendant sued in any of his Majesty's courts of law, in any action of *assumpsit*, debt, detinue, or trover, such application being made after declaration and before plea, by affidavit or otherwise, shewing that such defendant does not claim any interest in the subject-matter of the suit, but that the right thereto is claimed or supposed to belong to some third party, who has sued or is expected to sue for the same, and that such defendant does not in any manner collude with such third party, but is ready to bring into Court, or to pay or dispose of, the subject-matter of the action in such manner as the Court (or any Judge thereof) may order or direct, it shall be lawful for the Court, or any Judge thereof, to make rules and orders calling upon such

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third party to appear, and to state the nature and particulars of his claim, and maintain or relinquish his claim; and upon such rule or order to hear the allegations, as well of such third party as of the plaintiff; and in the mean time to stay the proceedings in such action; and, finally, to order such third party to make himself defendant in the same or some other action, or to proceed to trial on one or more feigned issue or issues; and also to direct which of the parties shall be plaintiff or defendant on such trial, or with the consent of the plaintiff and such third party, their counsel or attornies, to dispose of the merits of their claims and determine the same in a summary manner; and to make such other rules and orders therein as to costs, and all other matters, as may appear to be just and reasonable." Without applying the word *collude* in an offensive sense, we cannot avoid seeing that the Defendant has placed himself in the situation in which he now stands, at the request, and with a view to the interest, of his nephew. The rule, therefore, must be

Discharged.

June 6.

BRADDICK *v.* SMITH.

The interpleader act does not apply to a case where the Defendant has a legal claim.

THIS was an action of trover against a wharfinger, who detained, for his lien, goods, the property in which was disputed between the Plaintiff and *J. S.*

Coleridge Serjt. moved, on the part of *Smith*, that the Plaintiff should pay *Smith*'s lien, and substitute *J. S.* as Defendant.

But

But the *Court* thought the interpleader act did not extend to the case where the actual Defendant had a legal claim; and *Coleridge*

Took nothing.

CARLISLE *v.* GARLAND.

June 15.

UPON two rules for a review of the prothonotary's taxation of costs, the one obtained on the part of the Defendant, the other on the part of the Plaintiff, the question was, whether the Plaintiff, who had succeeded upon two trials, was entitled to the costs of both, and also to the costs of a rule for entering judgment *nunc pro tunc*.

The cause was first tried in 1825, when a verdict was found for the Plaintiff, with leave for the Defendant to move to set it aside, and enter a nonsuit instead, upon a point reserved at the trial.

A rule *nisi* was accordingly obtained on this point; but the Court was obliged to send the cause down to a new trial, a fact material to their decision being wanting upon the Judge's notes of the first trial.

At the second trial a special verdict was found, upon which judgment was given for the Plaintiff.

After the second verdict the Defendant died, and judgment was delayed by various obstacles, till at length the parties who had acted for the Defendant consented that the cause should go on as if the Defendant were still alive; and in the last term a rule for entering judgment *nunc pro tunc* was made absolute.

The prothonotary had allowed the Plaintiff the costs of both trials, but not the costs of the rule for entering judgment *nunc pro tunc*.

The rules of *Hil.* 2 *W.* 4. are not retrospective; and a party who before those rules succeeded on two trials, is still entitled to the costs of both, and to the costs of entering up judgment *nunc pro tunc*, if the delay has not been occasioned by himself.

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Peake Serjt. for the Defendant. According to rule 64. *Hil.* 2 *W.* 4. the Plaintiff is not entitled to the costs of the first trial. Neither is he, according to the old practice, if his case is to be decided by that. It is true, that, according to that practice, a party in this Court who succeeded in two trials was, generally speaking, entitled to the costs of both: but not where upon the first trial the jury found an insufficient verdict upon which no judgment could be given, and neither party was in fault. *Worcestershire and Staffordshire Canal Company* v. *Trent and Mersey Navigation Company* (*a*). And such in effect was the case here. As to the costs of the rule for judgment *nunc pro tunc*, they accrue after the date of the judgment, and therefore cannot be costs in this cause.

Wilde Serjt. for the Plaintiff. The new rule does not apply retrospectively to a trial in 1825. In the *Worcestershire and Staffordshire Canal Company* v. *The Trent and Mersey Navigation Company*, the rule for a new trial expressly reserved the consideration of the costs of the former trial till another trial should have taken place; and in *Bird* v. *Appleton* (*b*), Lord *Kenyon* says, "In the Common Pleas, if a new trial be granted, *and the rule say nothing about costs*, if the second verdict go the same way, the party succeeding has the costs of both trials." *Payne* v. *Bailey* (*c*) is in point for the Plaintiff. There the plaintiff obtained a verdict subject to the award of an arbitrator. The arbitrator having made a material mistake in his award, and the defendant having refused to refer matters back, the Court set aside the verdict, and discharged the rule for a reference. The plaintiff took the cause down to trial a second time, and

(*a*) 2 *Marsh.* 475. (*b*) 1 *East*, 111. (*c*) 3 *B.* & *B.* 304.

a second

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a second time obtained a verdict: it was held that he was entitled to the costs of both trials.

Then, the rule for judgment *nunc pro tunc* was necessary to obtain for the plaintiff the benefit of his verdict; and as the delay which has occurred is not imputed to him, he is entitled to those as well as all other costs, without incurring which he could not obtain the fruit of his action.

TINDAL C. J. It would be a great hardship on persons who have taken steps in a cause, with reference to the old practice, to find themselves by the new rules in a situation which they never contemplated: this case, therefore, must be governed by the practice which prevailed at the time. According to that practice, as is well known, the party who, after a verdict in his favour, succeeded upon a second trial, was entitled to the costs of both, unless some special reason appeared for refusing him the costs of the first. Such a reason, it is contended, exists in this case; namely, that the second trial was occasioned by a defect in the finding of the first jury, for which neither of them was to blame; and the case of the *Worcestershire Canal Company* v. *The Trent and Mersey Navigation Company* has been referred to. But, in that case, the verdict was found subject to a special case, and the question of the costs for the first trial was expressly reserved for future consideration by the rule granting the new trial: here there was a general verdict for the Plaintiff; he had a right to say he was satisfied; and it was in case of the Defendant that the cause went down to trial a second time.

With respect to the costs of the rule for judgment *nunc pro tunc*, it was necessary that the Plaintiff should incur those costs in order to reap the fruit of his verdict: except in point of date I cannot distinguish them from interlocutory costs: they fall within the same rule, and

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must be considered costs in the cause. The rule, therefore, for the prothonotary to allow those costs must be made absolute, and the rule for disallowing the costs of the first trial be discharged.

The rest of the Court concurred in pronouncing the Rules absolute and discharged accordingly.

June 15.

GODDARD *v.* JARVIS.

Defendant put in bail by affidavit, but omitted to give four days' notice of justification: Plaintiff having proceeded on the bail-bond, the Court refused to stay proceedings upon an application made within twenty days after justification.

ON the 1st of *June* the Defendant put in special bail, who made affidavit of justification in the form prescribed by Reg. Gen. *Trin.* 1831, rule 3. But he omitted to give four days' notice of justification as required by rule 1. Whereupon the Plaintiff proceeded on the bail bond; when

Wilde Serjt. obtained a rule *nisi* to stay his proceedings, on the ground that the bail had justified.

Jones Serjt., who shewed cause, contended that as the Defendant had not given the four days' notice of justification required by rule 1, the Plaintiff was not concluded by the affidavit of justification; but had, as under the old practice, twenty days to except to the bail, and the applicant, therefore, had as yet no *locus standi*.

Wilde relied on the affidavit of justification, as superseding the necessity of notice; but

The Court thought the Defendant was in default as to the notice required by rule 1. *Trin.* 1831; that the Plaintiff,

Plaintiff, therefore, had, as formerly, twenty days to except to the bail, and, consequently, that the applicant was not in court to make this motion.

Rule discharged.

HALL *v.* PHILLIPS. *June* 13.

A VERDICT had been taken for the Plaintiff, with damages, subject to the award of a barrister within a certain time.

The award was not made within the time specified, which the arbitrator had omitted to enlarge. The Defendant refused to proceed with the arbitration, or to name another arbitrator; whereupon

When a verdict is taken, with damages subject to the award of an arbitrator, if the arbitrator omit to make his award within the specified time, the Court will send the cause down to a new trial.

Wilde Serjt. obtained a rule *nisi* to enter up judgment for the Plaintiff, relying on *Woolley* v. *Kelly* (*a*), where, in an action against several defendants, a verdict was taken for the plaintiff for 400*l.* damages, subject to a point of law, reserved for the opinion of the Court; and in case that point should be determined in favour of the plaintiff, then subject to the award of a barrister as to the damages. The point of law having been decided in favour of the plaintiff, the arbitrator, who had been consulted by one of the parties in the cause, declined proceeding in the reference. One of the Defendants refused to name any other arbitrator. Under these circumstances, the Court ordered judgment and execution to issue against that defendant for the damages found by the jury, unless he would consent to refer the damages to some other arbitrator.

(*a*) 1 *B.* & *C.* 68.

Taddy

1832.

HALL v. PHILLIPS.

Taddy Serjt., who shewed cause, contended that the case must be retried, just as if the arbitrator had died before making his award. Thus, in *Harper* v. *Abrahams* (*a*), where a plaintiff having obtained a verdict subject to a reference, the arbitrator died before making his award, and the parties agreed that another should be substituted in his stead, but one of them afterwards objected to such substitution; the Court of Common Pleas refused to interfere, as the death of the arbitrator had the effect of opening the cause.

Wilde observed, that *Woolley* v. *Kelly* was decided after *Harper* v. *Abrahams*.

TINDAL C. J. The ground of my opinion is, that here the time for the award has expired without any default on the part of the Defendant. In *Woolley* v. *Kelly* the time had not expired, and the question of law had been decided by the Court. In *Harper* v. *Abrahams* the Court refused to enter up judgment, because, on the death of the arbitrator, they considered the question still open. That is the case here, and the cause must go down to trial again.

Rule discharged.

(*a*) 4 *B. M.* 3.

1832.

AMOR *v.* BLOFIELD.

June 15.

THE Plaintiff issued a bailable writ for 28*l*. The sheriff accepted, instead of a bail bond, an undertaking of the Defendant's attorney to put in special bail. The Defendant was never actually arrested; and was ultimately allowed to file common bail, instead of putting in and perfecting special bail, the affidavit, on which the Plaintiff's writ issued, proving to be defective.

The Plaintiff having recovered only 14*l*.,

Wilde Serjt. obtained a rule to tax the Defendant his costs under 43 G. 3. *c.* 46. *s.* 3.

Andrews Serjt. shewed cause. That statute only gives the Defendant his costs where he has been arrested and held to special bail. Here he was neither arrested, nor did he put in special bail.

Wilde contended, that issuing a bailable writ, and obtaining an undertaking to put in special bail, was constructively an arrest and holding to bail within the intent of the act, which being remedial, must receive a liberal construction. The Defendant had incurred the inconvenience of coming to the Court to set aside the Plaintiff's process.

TINDAL C. J. The Defendant does not fall within the description of persons entitled to costs under the 43 G. 3. *c.* 46. The words of the statute are, "in all actions wherein the defendant shall be arrested and held to special bail, and the plaintiff shall not recover the amount of the sum for which the defendant shall have been

Where, upon a bailable writ, the Defendant is not actually arrested, but files common bail in consequence of a defect in the affidavit to hold to bail, he is not entitled to costs under 43 G. 3. *c.* 46., upon the Plaintiff's recovering less than would have entitled him to proceed by bailable writ.

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been so arrested, such defendant shall be entitled to costs of suit, provided it shall be made to appear to the satisfaction of the Court that the plaintiff had not any reasonable or probable cause for causing the defendant to be arrested and held to special bail in such amount as aforesaid." Here there was neither arrest nor holding to bail; for, instead of a bail bond, the Defendant's attorney gave an undertaking to appear, and afterwards, upon a defect being pointed out in the Plaintiff's affidavit to hold to bail, the Defendant was allowed to enter a common appearance. He, therefore, has not been subjected to the inconvenience of an unjust arrest. In *Berry* v. *Adamson* (*a*), where a sheriff's officer, to whom a warrant upon a writ against *Adamson* was delivered, sent a message to *Adamson*, and asked him to fix a time to call and give bail, and *Adamson* accordingly fixed a time, attended, and gave bail; it was held that that was not an arrest, and that an action for a malicious arrest would not lie against the party suing out the writ, although he had no cause of action.

PARK J. I am of the same opinion. It is impossible to distinguish this case in principle from *Berry* v. *Adamson*.

GASELEE J. In *Berry* v. *Adamson*, Lord *Tenterden* decides that circumstances like the present do not constitute even a constructive arrest.

BOSANQUET J. This application being founded on a statute, the party ought to bring himself within the terms of that statute. But he has neither been arrested nor held to special bail.

Rule discharged.

(*a*) 6 *B.* & *C.* 528.

1832.

PORTER, Assignee of HURLAND, a Bankrupt, *v.* VORLEY.

June 15.

THIS was an action of *assumpsit* in which the Plaintiff declared, that in consideration that the bankrupt *Hurland* had, before his bankruptcy, let to the defendant a phaeton on hire, the defendant undertook to use it in a moderate and proper manner; and the declaration then alleged, as a breach, that he did not so use it, but that in consequence of the improper use of it, it was broken and damaged. The defendant pleaded the general issue.

At the trial it appeared on the evidence, that such contract had been entered into between the Defendant and *Hurland*; that the phaeton had been overturned and broken by the defendant's negligence, whilst in his employment; and that the expense of repairing the damage amounted to 9*l.* 15*s.* It appeared further, however, that the phaeton was not the property of the bankrupt, but was one which he had hired from a coachmaker of the name of *Mills*; and that after the phaeton came back, in its damaged state, it was sent home by *Hurland* to *Mills*, who repaired it, with the assent of the bankrupt, and had since proved the amount, as work and labour, under the commission; but that *Hurland*'s estate had not, at the time of the trial, paid, nor was likely to pay, any dividend. A verdict was directed to be entered for the Plaintiff for nominal damages, on the ground that the contract entered into was broken, but that no actual damage was proved to have been sustained, or was necessarily to be sustained by the breach of the contract, either by the bankrupt, or by the plaintiffs as assignees of his estate;

H., before his bankruptcy, hired a carriage of *M.*, and let it to Defendant; Defendant sent it back to *H.* damaged; *M.* repaired it with the assent of *H.*, and *H.* having become bankrupt, proved the amount due for repairs under *H.*'s commission: Held, that *H.*'s assignees had a right of action against the Defendant, although *H.*'s estate paid no dividend.

But

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But *Tindal* C. J., before whom the cause was tried, reserved leave for the Plaintiff to move to increase the verdict to 9*l.* 17*s.* 6*d.*, the amount of the damage found by the jury to have been done to the phaeton. A rule *nisi* having been granted accordingly,

Jones Serjt., who shewed cause, contended that the bankrupt act, 6 *G.* 4. *c.* 16., does not transfer to the assignees of a bankrupt a right to sue for damages in respect of a contingent liability cast on the bankrupt's estate. The only interest in this matter which the assignees took under the commission was a right to sue the defendant in respect of the hire of the phaeton. That was a debt which passed by the assignment; but a claim in respect of possible loss to the bankrupt's estate is not pointed out by the statute as a subject of assignment. Properly speaking, if the defendant were to pay to the assignees the expense of repairing the phaeton, they would hold the money as trustees for *Mills*. If they were merely trustees to hand over the whole amount, they could not claim it by virtue of the commission, under which they would only be authorized to pay him a dividend.

Wilde Serjt., *contrà*. As against the defendant, the bankrupt must be considered owner of the phaeton; and he or his assignees are the only persons to whom the defendant is liable on his contract in respect of the phaeton, or for any consequences arising out of that contract. The assignees stand in the place of the bankrupt as to that contract and all its consequences. Now, if the bankrupt, before bankruptcy, had sued the defendant for the damage done to the vehicle, the defendant could not have set up the title of *Mills*, nor can he against the assignees: for the assignment does not alter the consequences of the contract. The assignees have as much

right

right to recover damages in respect of the defendant's implied contract to keep the phaeton whole, as in respect of his actual contract to pay for the hire of it.

Cur. adv. vult.

TINDAL C. J. (after stating the facts as *ante*, p. 93.) It is unnecessary to discuss one of the questions raised before us, namely, whether a right to sue for uncertain damages passes to the assignees; the case of *Wright* v. *Fairfield*, very lately decided in the Court of King's Bench (*a*), being an express authority that such right of action passes under the assignment. Nor does it appear to us, that any distinction can be taken on the ground that the subject-matter to which this contract related, the phaeton, was not the property of the bankrupt, and did not come to the assignees; because it was perfectly immaterial as between *Hurland* and *Vorley*, whether the absolute property vested in the former or not, as long as he had sufficient possession of it to enable *Vorley* to enjoy it under the contract of hire, of which there was no doubt. And as to the question of damages, if *Hurland*, before his bankruptcy, had done the necessary repairs himself, or had paid for them when done, he would undoubtedly have been entitled to the whole sum which was laid out; or if his estate had actually paid, or had been proved ever likely to pay, any part of the amount proved against it, such proportion would have been the measure of the damages sustained by the bankrupt's estate. But as there is no proof to this effect, the consequence appears to us to be, that the Plaintiffs are entitled to nominal damages for the breach of a contract on which they had the right to sue, and where no actual damage is proved.

Rule discharged. (*b*)

(*a*) 2 *B. & Adol.* 727.
(*b*) See *Marzetti* v. *Williams*, 1 *B. & Adol.* 415.

1832.

June 15. RAW and Others, Assignees of LEIGH, a Bankrupt, *v.* CUTTEN.

The provisional assignee of a bankrupt is not responsible for the fraud of an agent appointed with due care.

THIS was an action for money had and received to the use of the Plaintiffs.

The Defendant, a messenger under the great seal, attached to the list of commissioners in *London*, to whom the commission against *Leigh* the bankrupt was directed, had been appointed by them provisional assignee under that commission, and had employed one *Williams* as his servant or agent to manage the business of the bankrupt in *Northamptonshire*, and receive money due. *Williams* received money due to the bankrupt, but never paid it over to the Defendant; whereupon the Plaintiffs, assignees chosen by the creditors, sued the Defendant in this action for the money so received by *Williams*. There being no proof nor even suggestion that the Defendant had been guilty of negligence in appointing *Williams* his agent, the Plaintiffs were nonsuited, with leave to move to enter up a verdict for the amount sought to be recovered.

Spankie Serjt. having accordingly obtained a rule *nisi* on the ground that the Defendant was responsible for the acts of his agent,

Wilde Serjt. shewed cause. The Defendant is no more than a trustee, and, as such, is not liable in this action for money which never came to his hands. A trustee is liable only for what he actually receives, and not for losses incurred in the fair discharge of his trust.

Adams

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Adams v. *Claxton* (*a*), *Bacon* v. *Bacon* (*b*), *Knight* v. *Lord Plymouth* (*c*), *Ex parte Litchfield* (*d*), *Ex parte Belchier*, *Ex parte Parsons*. (*e*)

In *Ex parte Turner* (*g*) it was held, that assignees chosen by the creditors are not liable under circumstances like the present, and a provisional assignee stands in the same situation. At all events, the remedy is by application to the Court of Chancery, and not by an action at law.

Spankie. The courts at law have on these matters a concurrent jurisdiction. *Hartop* v. *Juckes* (*h*), *Ex parte Hartop* (*i*), *Hart* v. *Biggs* (*k*), *Ex parte Johnson*. (*l*)

An action lies against the provisional assignee of a bankrupt for money had and received. *Edmeads* v. *Newman*. (*m*) And the permanent assignee may sue the provisional assignee for the balance remaining in his hands. *De Cossion* v. *Vaughan* (*n*), *Wray* v. *Barwis* (*o*), *Smith* v. *Jameson*. (*p*) Then, upon the principle of *respondeat superior*, receipt of money by the agent of the provisional assignee must be considered as receipt by the provisional assignee himself, otherwise, by shifting his responsibility, he might waste the bankrupt's estate. And this is no hardship, for he may take security from the agent he employs. His situation resembles that of a sheriff; and in *Ex parte Litchfield*, Lord *Hardwicke* held an assignee liable for the default of a clerk whom he had trusted. In *Ex parte Belchier*, *Ex parte Parsons*, and *Ex parte Turner* the parties who occasioned the deficiency were not agents of the assignee. *Bacon*

(*a*) 6 *Ves.* 226.
(*b*) 5 *Ves.* 331.
(*c*) 3 *Atk.* 480.
(*d*) 1 *Atk.* 87.
(*e*) *Ambl.* 218.
(*g*) 1 *Mont. & M^c A.* 52.
(*h*) 2 *M. & S.* 438.
(*i*) 9 *Ves.* 109. 12 *Ves.* 349.
(*k*) *Holt*, 245.
(*l*) 1 *Glyn & J.* 23.
(*m*) 1 *B. & C.* 418.
(*n*) 10 *East*, 61.
(*o*) *Peake N. P. C.* 69.
(*p*) *Id.* 215.

v. *Bacon*,

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v. *Bacon*, *Claxton* v. *Adams*, and *Knight* v. *Lord Plymouth* may be considered as overruled by *Wren* v. *Kirton* (*a*); while in *Booth* v. *Ingledew* (*b*), and *Ex parte Griffin* (*c*), assignees were held responsible for the default of a clerk.

Cur. adv. vult.

TINDAL C. J. In this case the Defendant *Cutten*, was the provisional assignee appointed by the commissioners under the commission issued against *Leigh* the bankrupt, and the money for which the Plaintiffs, the assignees chosen by the creditors, bring their action, is money received by one *Williams*, who was employed by the Defendant as his servant or agent to go down to *Northamptonshire* for the purpose of managing the business of the bankrupt, and receiving monies due to him, but which money so received by *Williams* he never paid over to the Defendant. There was no proof, nor indeed any suggestion, that the Defendant had been guilty of negligence in selecting *Williams* as his agent for that purpose. On this state of facts the question is, whether an action for money had and received is maintainable against the Defendant, and we are of opinion that under the circumstances of this case such action is not maintainable.

On the part of the Plaintiff it is contended, that the situation and character of the provisional assignee is the same as that of the sheriff under a writ of execution, who is answerable *civiliter*, as well for all monies received as all acts done by his bailiffs or servants, upon the principle "*respondeat superior*." On the part of the Defendant it is argued, that he is strictly and properly a trustee; and as such trustee, if liable at all to an action at law, he is only liable where the money actually comes

(*a*) 11 *Ves.* 377.
(*b*) 1 *Mont.* 248.
(*c*) 2 *Glyn & J.* 114.

to

to his hands, or fails in coming to his hands by his own neglect or default.

The office of temporary or provisional assignee did not exist before the 5 *Ann. c.* 22. By that statute the creditors were, for the first time, empowered to elect the assignees, who before were appointed by the commissioners, but as such choice could not take place without some delay, and as in certain cases, the immediate appointment of an assignee was absolutely necessary for the preservation of the property, it was enacted by the fifth section in the terms which have been since nearly followed in all the subsequent acts, "that it should be lawful for the commissioners, for the better preserving or securing the bankrupt's estate, immediately to appoint or make one or more assignee or assignees of the estate, or any part thereof, which assignee might be removed or displaced at the meeting of the creditors, if the major part should so think fit." The object, therefore, of the appointment would be defeated, unless the provisional assignee takes the whole legal interest in the property assigned to him as fully and effectually to all intents and purposes as the assignees afterwards chosen by the creditors take the same, and accordingly the provisional assignment transfers such property to him in the largest and most comprehensive terms. In fact, the general assignees take by assignment from the provisional assignee the very same property which had been conveyed to him, and upon the same precise trusts as those under which he took, except, that there is added in the assignment to the provisional assignee, that the transfer is made in trust for the immediate preservation of the bankrupt's property.

That the provisional assignee is therefore a trustee, in the same sense and to the same extent as the general assignee, appears undeniable. The question therefore arises as to the extent of his liability as such trustee:

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for, admitting for the purpose of argument, that the Plaintiffs are not driven to their remedy in equity as against a trustee who has been guilty of a breach of trust, but that they may have recourse to the action for money had and received, still it must be conceded, that whatever would have formed an answer to a bill in equity, will also be a defence against the present action; so that the enquiry is, whether the Defendant has been guilty of such negligence or default in allowing *Williams* to receive the money that was collected, as that he shall be subject to the same liability as if he had actually received the money himself. There seems no reasonable ground for contending, that the provisional assignee is liable to a greater degree of responsibility than the general assignee who is chosen by the creditors. The provisional assignee is appointed by the authority of the commissioners, and in the present case, according to the general course observed in practice, was one of the messengers under the great seal, attached to the list of commissioners to whom this commission was directed. He was a person known by the commissioners at the time of his appointment to be unable to attend personally the execution of the duties of his office in *Northamptonshire*, by reason of the conflicting duties of his office of messenger in *London*. He may be and frequently is, made provisional assignee under different commissions running at the same time; in which case, it would be impossible for him to execute the duties personally under all the commissions. It must be presumed, therefore, that it was well known on the part of the commissioners, from whom his trust was derived, that he should have power to execute such part of his duties as could not be personally executed by himself, by an agent properly and discreetly chosen.

Under these circumstances the present question arises, whether the provisional assignee is to be answerable for all

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all sums received and all acts done by such agent, as if he were a guarantee; or is he only to be answerable, where he has been guilty of a default in the appointment and choice of such agent? It has been argued, that the case resembles that of a sheriff, who undoubtedly would be liable to the Plaintiff in any action, for money levied and received by his bailiff, although not paid over to himself. In the first place, the sheriff is no trustee, having no interest in the goods seized and sold. He is a public officer upon whom the law casts the ministerial duty of seizing and selling under the king's writ. There may well, therefore, be one scale of responsibility attached to the breach of trust in the trustee, and another to the breach of an express command made by the law to a ministerial officer. Again, from the necessity of the case, and for the security of the king's subjects, the rule *respondeat superior* has been laid down from the earliest times in the case of sheriffs over whose appointment the public have no control; and in consequence of that known rule of law, the practice has prevailed from early times that the deputies and bailiffs of the sheriffs give security to him against their wrongful acts done in the execution of warrants granted by him. It would be unreasonable, therefore, to apply such rule to the present case, which comes under the description of the nonperformance of a trust by a trustee appointed for a particular purpose, namely, the trust of paying over to the assignees all the monies received by the Defendant. The real question appears to us to be, whether, if a bill had been filed by the general assignees against the provisional assignee, he would have been held liable for the money so received and not paid over by his agent. The case in the matter of *The Earl of Lichfield* (*a*) would seem at first to bear

(*a*) 1 *Atk.* 87.

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against the present Defendant. He had entrusted the clerk to the commission to receive and to pay some of the effects and debts of the bankrupt. No fraud appeared in the assignee, but the clerk afterwards failing, the question was, whether the assignee should make up the deficiency. Lord *Hardwicke* held the assignee liable upon the general principle of any other trustee, who, if his agent deceives him, *respondeat superior* to the *cestui que trusts*. But he afterwards adds as the ground of his judgment, that the assignee employed the clerk to the commission, "a person of very little credit," to pay the dividends; and, again, that "he did not consult with the body of the creditors, who are his *cestui que trusts*, in the appointment of this agent." So that it is clear that his judgment proceeds on a want of proper care in the assignee, in appointing the particular agent. On the other hand, the case of *Knight* v. *Lord Plymouth* (*a*) is strongly in favour of the Defendant. In that case the receiver under the Court of Chancery, who thought it not safe to remit to *London* the specie collected by him, and therefore paid it in to a tradesman at *Worcester*, then in good credit, from whom he took bills of exchange payable on persons in *London*, was held to be not responsible for the amount, by reason of the failure of such tradesman: the Chancellor saying, it was a loss not owing to any default of his, but was a necessary precaution on his part to remit by bills rather than in specie: but at the same time saying, if the money had been lost by his wilful default, he should have been obliged to answer the loss. And, again, in *Ex parte Belchier* (*b*), Lord *Hardwicke* goes much more fully into the principle by which the question of the assignee's liability is to be governed. That was a case where the

(*a*) 3 *Atk.* 480.

(*b*) *Ambl.* 218.

assignee,

assignee, after employing a broker to sell tobacco the property of the bankrupt, allowed the money to remain in his hands ten days, when he died insolvent. Lord *Hardwicke* said, "If the assignee is chargeable in that case, no man in his senses would act as assignee under commissions of bankrupt. This Court has laid down a rule with regard to the transactions of assignees, and more so of trustees, so as not to strike a terror into mankind acting for the benefit of others, and not for their own. Courts of law and equity too, are more strict as to executors and administrators; but where trustees act by other hands, either from necessity, or conformably to the common usage of mankind, they are not answerable for losses." In another part of the judgment he adds, "the assignee in this case acts as prudently for the trust as for himself, and according to the usage of business." This case, it is to be observed, came before Lord *Hardwicke* in 1754, nearly twenty years after that of *The Earl of Lichfield*. The same doctrine is laid down in *Adams* v. *Claxton* (*a*), where the agent of a trustee, appointed under an assignment for the benefit of creditors, having paid the money which he had collected into *Nightengale*'s bank, and the bank having failed, the trustee was held not to be liable for its failure.

Inasmuch, therefore, as the provisional assignee had the power, both from the necessity of the case, and also from the ordinary course of business observed on similar occasions, to execute this part of his duty by means of an agent, and as there is the entire absence of fraud on the part of the Defendant, and no proof of negligence in choosing an insufficient or dishonest person as his agent, we hold, upon the authority of the

(*a*) 6 *Ves.* jun. 226.

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cases above referred to, that he is not to be charged with the money received by *Williams* and not paid over to the Defendant, in an action for money had and received by him to the use of the Plaintiff.

Rule discharged.

June 15.

DOE dem. PRESCOTT *v.* ROE.

A judge at chambers has authority to order costs.

THE judgment and execution in this case had been set aside by a judge at chambers in vacation, and the plaintiff at the same time was ordered to pay the defendant his costs. In *Easter* term last,

Jones Serjt. obtained a rule *nisi* to set this order aside, *quatenus* the costs, on the ground that a judge at chambers had not authority to order costs; for which position he cited *Read* v. *Lee*. (*a*)

Wilde Serjt. shewed cause. Although the decision in *Read* v. *Lee* is adverse to the authority of a judge at chambers in the matter of costs, the language of the court is in favour of such a jurisdiction. Lord *Tenterden* points out the benefit resulting to parties in the way of expedition and economy, from the summary tribunal of a single judge; but that tribunal will be unavailing for either purpose, if the suitor be compelled either to renounce his costs, or to apply for them to the superior court.

Jones. By a recent act of parliament, a single judge sitting apart in term time, is authorised to make rules of

(*a*) 2 *B.* & *Adol.* 415.

the

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the same force as the whole court in banc; but that act would have been unnecessary, if a single judge had the power before, either in term or vacation. There is, however, no trace of the origin or recognition of any such power.

Cur. adv. vult.

TINDAL C. J. The question raised upon this application is, whether a judge at chambers has authority to make an order for the payment of costs by the party against whom he decides on a point brought before him on summons.

The authority of a judge at chambers to make orders in the various cases which are brought before him, is, when considered upon principle, the authority of the court itself; for no order which is made can be enforced by attachment, until it has been first made a rule of the court; and the party who disputes the propriety of the order, has the opportunity, as in the present instance, to question its validity by application to the court. On any other principle it is difficult to account for the validity of many acts done by a single judge at chambers, such as setting aside irregular judgments signed in vacation, which judgments are to be considered on principle the acts of the whole court; discharging persons under writs of execution improperly taken out, and the like. And considered as resting on this principle, we see no reason why a single judge should not make the payment of costs a part of his order; because, until such order is made a rule of the court, where the party called upon has the opportunity to contest it, it is altogether inoperative. It would certainly impose a great hardship in many cases upon suitors, if no such powers existed. Costs are, in many cases, so important a consideration with the poorer suitor, that if he could not

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not obtain them at chambers, he would make his application to the court, and to the court alone, at a much greater expense.

If, therefore, he was improperly arrested, or his goods taken in execution at the commencement of the long vacation, the defendant would be placed in the alternative either of applying to a judge at Chambers, subject to the loss of his costs, or of remaining in prison, or being deprived of his goods until the next term, when he might apply to the full court. The want of such power in any case to award costs, would probably have the effect of driving parties to apply to that forum which had authority to grant them, and thus operate to prevent the frequency of application to chambers, where so much of the ordinary practice in a suit is conducted with equal despatch and with much less expense. We think, therefore, the judge at chambers has the power to direct payment of costs on the same principle that he has to exercise any other authority in the progress of a cause; but at the same time, it is obviously one which ought to be exercised with care and discretion.

The present rule, therefore, must be discharged.

Rule discharged accordingly.

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BEVAN and Another, Assignees of A. NUNN, a Bankrupt, *v.* B. NUNN and Another.

TROVER. The jury found that the goods had been delivered by the bankrupt to the Defendant in satisfaction of a *bonâ fide* debt, but voluntarily, and in contemplation of bankruptcy; and that such delivery took place four months before the commission was issued against him.

A verdict was taken for the Plaintiffs, with leave for the Defendants to enter a nonsuit, if the Court should be of opinion that they were protected by sect. 81. of 6 G. 4. *c.* 16., which enacts, "that all conveyances by, and all contracts and other dealings and transactions by and with any bankrupt *bonâ fide* made and entered into more than two calendar months before the date and issuing of the commission against him, and all executions and attachments against the lands and tenements, or goods and chattels of such bankrupt, *bonâ fide* executed or levied more than two calendar months before the issuing of such commission, shall be valid, notwithstanding any prior act of bankruptcy by him committed; provided the person or persons so dealing with such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not at the time of such conveyance, contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed; provided also, that where a commission has been superseded, if any other commission shall issue against any person or persons comprised in such first commission within two calendar months next after it shall have been superseded, no such conveyance, contract,

Under 6 G. 4. *c.* 16. a transfer of goods in satisfaction of a *bonâ fide* debt, made voluntarily, and in contemplation of bankruptcy, is an act of bankruptcy, and not protected by the eighty-first section, though made more than two months before a commission issues.

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contract, dealing or transaction, execution or attachment shall be valid, unless made, entered into, executed, or levied more than two calendar months before the issuing the first commission."

Spankie Serjt. having accordingly obtained a rule *nisi* for entering a nonsuit,

Wilde Serjt. shewed cause. The eighty-first section of 6 *G.* 4. *c.* 16. was framed to protect transactions which could be avoided only by preceding acts of bankruptcy; and not an act fraudulent, or an act of bankruptcy in itself. Such acts have never been protected on the ground that they took place two months before the commission. In *Pulling* v. *Tucker* (*a*) the transaction was two years before the commission. In *Poland* v. *Glynn* (*b*) the dates are not given, but the transaction must have been more than two months before the commission. In *Tucker* v. *Barrow* (*c*), where it seems Lord *Tenterden* thought the conveyance was protected, the question arose only incidentally at *Nisi Prius*, and was never argued. If the Defendants be protected by this section, fraudulent preference will be no longer a head of bankrupt law. But the eighty-first section was meant only to prevent the effect of a relation to the act of bankruptcy, where that relation is likely to work injustice; not, to render nugatory the effect of section 3. The words of sect. 81. too, are, "conveyances, contracts, and dealings *bonâ fide* made and entered into," which cannot be applied to a transfer tending to defeat the whole operation of the bankrupt laws. And the eighty-second section expressly excepts every payment "being a fraudulent preference of a creditor."

(*a*) 4 *B.* & *Ald.* 382.
(*b*) 4 *Bingh.* 22 *n.* 2 *D.* & *R.* 310.
(*c*) 1 *M.* & *M.* 137. 3 *Carr.* & *P.* 85.

Spankie.

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Spankie. The preference does not in itself affect the *bonâ fides* of the transaction, and is only unlawful as tending to defeat the equal distribution of property. But the legislature in this act meant to distinguish between preferences which were *malâ fide*, and fraudulent at common law, and preferences honest in themselves. Sect. 2. enumerates what persons shall be deemed traders liable to become bankrupt. And the acts of bankruptcy enumerated in sect. 3. are, "That if any such trader shall depart this realm, or being out of this realm shall remain abroad, or depart from his dwelling-house, or otherwise absent himself, or begin to keep his house, or suffer himself to be arrested for any debt not due, or yield himself to prison, or suffer himself to be outlawed, or procure himself to be arrested, or his goods, money, or chattels to be attached, sequestered, or taken in execution, or make or cause to be made, either within this realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods or chattels, or make or cause to be made any fraudulent surrender of any of his copyhold lands or tenements, or make or cause to be made any *fraudulent* gift, delivery, or transfer of any of his goods or chattels; every such trader doing, suffering, procuring, executing, permitting, making, or causing to be made any of the acts, deeds, or matters aforesaid, with intent to defeat or delay his creditors, shall be deemed to have thereby committed an act of bankruptcy." It is the necessary character of those acts that they are fraudulent and bad in themselves. The meaning of *bonâ fide* is, *on good consideration*; and that is a question for the jury. [*Alderson* J. Would a conveyance of all the trader's property on good consideration, two months before the act of bankruptcy, be valid?] That is an excepted case; for, by conveying all his property, the party must cease to be

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be a trader. In all other cases, the parties have, under this statute, the same rights as at common law, provided the two months have elapsed. The apparent inconsistency between the eighty-first section and the eighty-second is reconciled by the observations of Lord *Tenterden* in *Tucker* v. *Barrow*. As the eighty-first section protects payments which were not protected before, and tending, like *bonâ fide* transfers, to defeat equal distribution, there is reason to infer that such transfers were considered in *pari materiâ*, and that the legislature meant to uphold them.

Cur. adv. vult.

TINDAL C. J. In this case it was found by the jury, that the goods were delivered by the trader to the Defendants in satisfaction of a *bonâ fide* debt, voluntarily, and in contemplation of bankruptcy, and that such delivery took place four months before the commission of bankruptcy was issued; and upon this finding the question has arisen and has been argued before us, whether such delivery is protected under the eighty-first section of the late bankrupt act, as being "a transaction *bonâ fide* made and entered into more than two calendar months before the date and issuing of the commission."

In support of the affirmative of this proposition, it is urged on behalf of the Defendants, that by the very words of that section, the only enquiry pointed out is, whether the transaction is *bonâ fide*, the proper meaning of which is contended to be *bonâ fide* at common law, independent of the statute of bankruptcy; that the eighty-first section is altogether silent on the subject of *fraudulent preference*, whereas in the eighty-second there is an express exception made of every payment, "being a fraudulent preference of a creditor," so that the statute itself points out the distinction by employing the term where it was intended to be applied; and, lastly, that

upon

upon the authority of a case of *Tucker and Another, Assignees, &c.* v. *Barrow* (*a*), before Lord *Tenterden* C. J., it is stated to have been held, that the doctrine of fraudulent preference only applies to cases within two months before the commission.

We think, however, upon a more full consideration of the bankrupt statute, that the transaction in question amounts to an act of bankruptcy in itself, and that, on that account, it is not protected by the eighty-first section of the statute.

By the third section, the making any fraudulent gift, delivery, or transfer of any part of a trader's goods or chattels, with intent to defeat or delay creditors, is, for the first time, declared to be an act of bankruptcy; such fraudulent transfer of a part of his goods not being attended with the consequence of bankruptcy under the former statutes, unless it was a grant or conveyance by deed. When, therefore, the present statute makes the very transaction in question a substantive act of bankruptcy, we think it cannot be a just interpretation of the eighty-first section to hold, that the effect and consequence of this very act of bankruptcy should itself be made valid, and protected by that clause.

If an interval of two months is held to be a protection of this act of bankruptcy, no reason can be assigned why the same rule of construction should not extend to a fraudulent conveyance of goods by deed, where such conveyance is made in satisfaction of a *bonâ fide* debt; for such fraudulent conveyance is made an act of bankruptcy under the very same third section. The last-mentioned act of bankruptcy, however, it must be admitted, is one which has no such limitation as to time.

Again, the object of the eighty-first section is to pro-

(*a*) 1 *Moody & M.* 137.

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tect *bonâ fide* transactions against the effect of prior secret acts of bankruptcy by relation. The clause, therefore, does not apply to any case, unless where a former act of bankruptcy is assumed to have been committed. But the case of a fraudulent preference in contemplation of bankruptcy does, *ex vi termini*, exclude the existence of any former act of bankruptcy. It would follow, therefore, that such act of fraudulent preference was never within the contemplation or scope of the eighty-first section, inasmuch as the proviso, at the end of that section, that the party had no notice of any prior act of bankruptcy, cannot by possibility apply to it.

It is further insisted by the defendants, that in the eighty-second section, all payments made by the bankrupt to any creditors before the date and suing forth of the commission, are made valid, with the express proviso that such payment is not a *fraudulent preference* of the creditor; and that as such proviso is not to be found in the eighty-first section, it is to be inferred that the present transaction is rendered valid by that section. But the answer to such inference appears to be this, that, as the payment of a debt to a creditor by way of preference, is not made an act of bankruptcy in itself, it became necessary to insert those words in the eighty-second section, otherwise such payment would have been made good under that clause; but that, as the delivery of any goods or chattels, by way of fraudulent preference to a creditor is made an act of bankruptcy, there was no danger that such delivery should be made valid by the eighty-first section; and therefore it is that the words are omitted in that section.

Upon the whole, it appears to us, that to adopt the construction contended for by the defendants, would be to enable the trader to defeat the whole object of the bankrupt laws, by first making a secret delivery of securities

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rities or other chattels to the largest possible amount in satisfaction of a *bonâ fide* debt due to a favoured creditor, and then by contriving to prevent the issuing of a commission of bankruptcy, for any period, however short, above two calendar months from such fraudulent delivery.

This, as it appears to us, would equally violate the letter and the intention of the bankrupt statute.

We therefore think the rule for entering a non-suit should be discharged.

Rule discharged.

NEWLAND *v.* WATKIN.

A warrant of attorney given by a clergyman, authorising his creditor to issue a sequestration, is void under 13 *Eliz.* c. 20.

THE Defendant, a clergyman, had raised money by way of annuity of the Plaintiff, and of *W. Morris*. To the Plaintiff he gave a warrant of attorney to enter up judgment for the arrears of his annuity, and in the warrant expressly authorized him to issue a sequestration.

He also gave *Morris* a warrant of attorney to enter up judgment for arrears, but the warrant to *Morris* contained no allusion to a sequestration.

The Defendant having failed to pay the annuities, the Plaintiff first, and then *Morris*, entered up judgment and issued respectively sequestrations against the Defendant's benefices: whereupon

Wilde Serjt., on the part of *Morris*, obtained a rule *nisi* to set aside the Plaintiff's warrant of attorney, judgment, and sequestration, on the ground that his warrant of attorney containing an express authority to issue a sequestration was a charge on the benefices, and there-

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fore void under 13 *Eliz. c.* 20. *s.* 1., which enacts, "that all chargings of such benefices with cure with any pension, or with any profit out of the same to be yielded or taken, hereafter to be made, other than rents to be reserved upon leases hereafter to be made according to the meaning of this act, shall be utterly void." And he referred to *Shaw* v. *Pritchard* (*a*), *Flight* v. *Salter* (*b*), *Gibbons* v. *Hooper* (*c*), and *Doe dem. Mitchinson* v. *Carter.* (*d*)

Taddy Serjt. shewed cause. Both parties are in the same situation, and the Court will not interpose in favour of one. The Plaintiff's warrant of attorney is a mere security for a debt; a mode of shortening process of law, and not a charging of the Defendant's benefice with any pension within the meaning of the statute. In *Flight* v. *Salter*, the warrant of attorney authorized the party to proceed immediately to sequestration before any arrears of the annuity were due, and the Court relied on *Doe dem. Mitchinson* v. *Carter*, where it was expressly found that the warrant of attorney was given in fraud of a covenant not to assign a lease. A debt is not a *profit* within the meaning of the statute; and, at all events, this application can only be made by the Defendant, and not by a stranger to the judgment.

Wilde. *Morris*, although not a party, has a sufficient interest to entitle him to apply for the removal of a judgment which impedes his own execution. *Saunders* v. *Hardinge.* (*e*) And the Plaintiff's warrant of attorney, expressly pointing at the proceeding by sequestration, is a charge on the benefice within the meaning of the statute.

(*a*) 10 *B.* & *C.* 241.
(*b*) 1 *B.* & *Adol.* 673.
(*c*) 2 *B.* & *Adol.* 734.
(*d*) 8 *T. R.* 57. 300.
(*e*) 5 *T. R.* 9.

After

After taking time to consider,

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The *Court* pronounced a rule, that *Newland* should no further enforce his writ of sequestration, but that he should not be subject to an action of trespass.

Rule absolute accordingly.

FOX *v.* CLIFTON and Others.

FOR the facts of this case see *ante*, vol. 6. p. 776. The cause having gone down to a second trial, pursuant to the decision of the Court there reported, the Plaintiffs, in addition to the evidence on which they had relied at the first trial, put in certain resolutions purporting to have been come to "at a meeting of the proprietors of the Imperial Distillery Company, held at the *City of London Tavern*, the 18th of *March* 1825, *S. B. M. Barrett*, Esq. M. P. in the chair." By these resolutions, after setting forth the utility of the undertaking, it was resolved that a company should then be formed under the denomination of the Imperial Distillery Company; that the capital should be 600,000*l.* in 12,000 shares of 50*l.* each, which the directors should distribute as they might think fit; that the company should be governed by twelve directors, who were therein, as well as the chairman, auditors, treasurers, engineer, counsel, solicitors, and secretary, named and appointed; that the directors should have power to take or purchase premises; and meet once a week or oftener, for the dispatch of business, the first meeting to be summoned for the next day.

See *ante*, vol. vi. p. 776.

It did not appear that the Defendants were present when these resolutions were entered into.

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Lane, the secretary to the company, who upon the first trial had stated that a conversation, in which he had assured the Plaintiff of the solvency of the company, took place previously to the contract which had been entered into with the Plaintiff, upon the second trial deposed that the conversation did not take place till after that contract. It was also proved that the scrip of the company was sold openly in the market by Mr. *Wettenhall*, a broker, and that persons producing that scrip and paying the instalments due, were, without further enquiry, permitted to sign the company's deed as partners. In other respects the evidence was in substance the same as upon the former trial, and, notwithstanding the direction of *Tindal* C. J., that the facts proved did not constitute the Defendants partners in the concern, the jury again found a verdict for the Plaintiff; whereupon,

Taddy Serjt. last *Michaelmas* term obtained a rule *nisi* for a new trial, on the ground, among other objections, that the verdict was against the evidence, and that the resolutions of the 18th of *March*, and the conversation with *Lane* ought not to have been presented to the jury as against these Defendants.

Wilde and *Bompas* Serjts. upon shewing cause against the rule, argued to the same effect as before, and the Court, after hearing counsel in support of the rule, took time to consider till this term, when judgment was delivered as follows, by

TINDAL C. J. This cause has come before the Court upon a second application for a new trial, and if the questions before the jury had been merely questions of fact, we should probably have hesitated much after two concurrent verdicts for the Plaintiffs, before we should have

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have sent the cause down to a third investigation. For although no precise rule can be laid down upon this point, but each case must stand upon its own proper ground, yet it would be only under very strong and well grounded dissatisfaction with the former verdicts, that the Court could be induced so far to interfere with the proper province of the jury on questions which the law has placed under their peculiar jurisdiction as to send a mere question of fact to trial by a third jury where two have before pronounced the same opinion upon it.

But the questions in this case submitted to the jury, were not questions of mere fact, but questions in which the law and the fact were so intimately involved and combined together, that the jury cannot be said to have come to a right conclusion upon the fact, unless they are contented to take the law upon the subject from the Judge who presides at the trial. Whether particular persons have entered into a partnership together, is, indeed, when abstractedly put, a question of mere fact: and if the affirmative of such question turns upon the execution or non-execution of a deed or agreement, or upon the balance of contradictory proof as to acts done by the parties which shew them to be partners, the question remains one of mere fact throughout the whole of the investigation. But if, instead of such direct testimony upon a question, simple enough in itself, the evidence of the partnership consists of printed or written documents, such as advertisements and resolutions; of acts done, not by the parties themselves, but by others who it is contended had authority to bind them; or of deeds executed not by all, but some only of the parties, the question whether these parties did enter into a partnership or not, no longer depends upon the investigation of single facts upon which the jury can be left to their own discretion and natural good sense in order to

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arrive at a just conclusion, but they must take from the Judge, the legal result of those documents and the legal consequence of those various facts, and be governed by his own opinion upon the law, where the facts in themselves are not in dispute.

Now the two first questions which arose on the former trials of this case, were precisely of this class and description. They were questions in which the whole difficulty lay in the application of the law to the facts, very little in the investigation of the facts themselves.

The facts presented to the jury upon these questions, on the last trial were substantially the same as those which were brought before them on the first, with the addition of the resolutions dated the 18th of *March*, which latter document appears to us to make no material alteration in the Plaintiff's favour. On this state of facts the opinion of the Court has been already declared upon the first question, that no partnership was created between the Defendants; and as we see no reason to alter the opinion then deliberately formed, it is unnecessary to repeat the grounds of it upon the present occasion. A similar observation arises upon the question secondly submitted to the jury, both upon the last and the former trial. The jury were directed upon each occasion, that the acts given in evidence by which the Defendants were supposed to have held themselves out to the world as ostensible partners, were not such as in point of law ought to bind the Defendants, being done neither with their knowledge nor their assent. Upon this question also, we forbear on this occasion, to repeat the ground of the opinion which we still entertain.

The third question which was left to the jury on the last trial was one upon which, if the facts were proved, they were bound to take the direction of the Judge as to the law.

Upon that question the jury were told, that if any of the

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the Defendants ever had a right to become a shareholder in the concern, and had parted with such right before the contracts entered into between the Plaintiffs and the Defendants, the verdict must pass for the Defendants. And upon the evidence the jury were told that if it was believed that *Levi*, one of the Defendants, had before the making of the contract on which the action is brought, sold and parted with the right he once possessed of becoming a shareholder in the concern, the action was at an end. We did not upon a former occasion express any opinion on this point; but it may be right to state upon the present, with a view to the course into which it may be judged expedient to put this cause either now or upon a future occasion, that such is our opinion. It seems to us that the scheme of this proposed partnership was such as to shew it was not constructed upon the ordinary ground of a common partnership in trade. The persons who applied for shares never did so from motives of mutual confidence in each other's stability, skill, or integrity. They were perfect strangers to each other; proposing, without any previous communication together, for the division amongst them of shares, 12,000 in number. From the bare consideration of the number, they never could expect that the persons who ultimately signed the deed, and became thereby partners together, would be the same individual persons who sent in proposals for shares. Indeed it was proved in evidence that the scrip was generally and publicly sold to strangers. It was further shewn that the shareholders acquiesced in it; for, when the deed was signed, no question was asked whether the person was an original subscriber or not; on the contrary, any person who produced the scrip receipt, and paid up the second instalment, was allowed to execute the deed. The present case, therefore, appears not to be governed by reference to the rules which restrain

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partners from parting with their shares in ordinary cases without each other's consent; for in this case the power of transferring the scrip to any one, cannot but have formed a part of the known original design. It appears, therefore, to us that at the time the contract was entered into with the Plaintiff, *Levi* was not, and could not be, a shareholder. He could not call upon the directors to admit him to a share, because he had parted with his scrip. On the other hand, the man who had purchased it, if he was willing to pay up the second instalment, would have been entitled and allowed to receive a certificate of his share and to execute the deed without difficulty. In addition, therefore, to the grounds of objection before adverted to, the undisputed facts before the jury on this third point, appear to us to put an end to this action, in which *Levi* is made a co-Defendant.

It has been contended, on the part of the Defendants, that evidence was improperly admitted at the trial. The first objection is, that the resolutions of the 18th of *March* were admitted in evidence, without proof that the Defendants attended the meeting when they were passed. However that may be as to some of the Defendants, the resolutions could not be excluded from the evidence as to the others, for one of them, *Plummer*, signed the deed.

It is then urged, that the evidence as to the holding out of the Defendants as partners was not admissible, because it took place, if at all, after the contract was made; but the answer given at the bar appears to be correct that such evidence was, at all events, admissible with reference to the first question in the case.

We think the finding upon each of these questions has been a finding against the legal result of the facts proved, and, upon this ground, we think the rule for a new trial should be made absolute on the payment of costs.

Rule absolute.

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(IN THE HOUSE OF LORDS.)

BAILIE *v.* GRANT.

A commission of bankrupt may be supported on a debt accruing before the bankrupt became a trader, and an act of bankruptcy committed after he has ceased to be a trader.

IN this case a question was proposed by the House, and the opinion of all the Judges delivered as follows by

TINDAL C. J. The question proposed by your Lordships to his Majesty's Judges, is this: —

A., not a trader, becomes indebted to *B.* to the amount of 100*l.* *A.* afterwards becomes a trader, and ceases to be a trader, never having paid his debt to *B.* After ceasing to be a trader, he commits an act of bankruptcy. Can *B.* support a commission against him, upon his debt, and that act of bankruptcy?

Upon this question the Judges, who have heard the argument at your Lordships' bar, are of opinion, that a commission may be supported against *A.* upon the debt and act of bankruptcy above supposed.

It has been decided, and has long been considered as law, that a debt contracted *before* a man enters into trade, but continuing unpaid at and after the time he is in trade, is a sufficient debt to support a commission taken out against him, upon an act of bankruptcy committed whilst he is a trader. See the case of *Butcher* v. *Easto.* (*a*)

It has also been established beyond dispute, that a petitioning creditor's debt contracted during the trading of the debtor will support a commission taken out against him on an act of bankruptcy committed after the trading has ceased. This point has been settled to be

(*a*) *Doug.* 295.

law

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law by various decisions, commencing with that of *Heylor* v. *Hall* (*a*), and ending with that of *Exparte Bamford.* (*b*) But it is contended, that although each of these propositions be true separately, yet that no inference can be drawn from them that the debt contracted *before* the trading, but subsisting during its continuance, and the act of bankruptcy committed *after* the trading, will support a commission. We think, however, that no valid or substantial distinction in this respect can be drawn between the debt contracted before, and that contracted during the trading.

The debt contracted before trade, but remaining unpaid at and after the time the debtor enters into trade, appears to us to be a subsisting debt for every purpose, and subject to every consequence, which belongs to a debt originally contracted during trade.

It is the same with respect to the trader's ability to carry on his trade. The money lent to the person, who afterwards commences trade, may be, and often is, the capital upon which the trade itself is carried on. At all events, the credit given to the trader by the forbearing to demand repayment, is one of the sources from which such capital is derived, and is the same, in effect, as a new loan. Again, the debt is attended, in both cases, with the same consequences, as to the trader's ability to repay it; for in each the power of repayment is equally affected by the success or failure of the trader. No one would contend, that a debt contracted during the period of trading, though not a *trade debt*, but contracted for private purposes, and applied to private occasions perfectly distinct from the trade, is it to be considered as differing in any respect from a debt contracted in the course of the trade itself. It seems, therefore, rather an artificial distinction, than a substantial difference, to hold

(*a*) *Palmer's Rep.* 325. (*b*) 15 *Ves.* jun. 449.

that

that the debt contracted after the trading has commenced shall support the commission taken out on an act of bankruptcy committed after the trading has ceased; but that the debt contracted before the trading, but continuing afterwards, shall not be attended with the same consequence. If a commission cannot be supported under these circumstances, a trader, by giving up his trade, which is a voluntary act on his part, would have the power of depriving his former creditors of the benefit of enforcing an equal distribution of his effects amongst all his creditors, and would be enabled to pay his subsequent creditors out of the very funds furnished or increased by those who were his creditors before he began trade: and, upon referring to the bankrupt acts, there does not appear to be any distinction created between these two classes of creditors, as to the right to petition for a commission.

The first statute which mentions a commission is the 13 *Eliz. c.* 7. *s.* 2., which states in the most general terms, "that the Lord Chancellor for the time being, *upon every complaint made in writing*, against such person or persons being bankrupt as is before defined, shall have full power by commission under the great seal, to name, assign, and appoint the persons therein described;" and all the subsequent statutes contain an enactment similar in effect to that in the 6 *G.* 4., the present bankrupt act, viz. that the Lord Chancellor shall have power, upon petition made to him in writing against any trader having committed an act of bankruptcy, "by *any creditor* or creditors of such trader," to issue his commission. Words which comprehend equally all creditors for debts existing during the trading, whether contracted before or after the commencement of the trading.

The principal stress of the argument at your Lordships' bar was placed, first upon the precise language used by the Judges in the cases above referred to, wherein

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wherein they assign the reason for their opinion that the *debt grew during the trading*. But in those cases the Judges speak with reference to the particular facts of the cases immediately before them; and such expressions afford no necessary inference that if the cases then under discussion had, like the present, been cases of a debt remaining and continuing during the trading, their conclusion, drawn from the other facts, would not have been precisely the same. Again, it has been argued that the statutes only authorise the suing out a commission against a person *using the trade* of merchandize by buying and selling, &c.; and that the ground upon which a commission is allowed to be sued out on an act of bankruptcy committed by the debtor after he has ceased to trade, is, that he cannot be considered as having left off trade whilst any of the debts contracted during trade are still unpaid. But if the debts contracted before, but continuing after, are virtually and substantially the debts of the trader, whilst a trader, as we think they are, the words of the statute which are allowed to extend to the one ought in reason to be held to include the other also.

Upon the whole, we think that both upon the reasonableness of the thing, and also upon the proper construction of the bankrupt acts, a commission may be well supported under the circumstances supposed in the case submitted to us by this House.

Judgment affirmed without costs.

(IN THE HOUSE OF LORDS.)

MELLISH *v.* RICHARDSON. (*a*)

It is competent to a court of error to examine the propriety of an amendment of the record made by the court below, being a court of record, the order for the amendment being sent up as part of the record.

QUESTIONS were in this case submitted by the House, and the opinion of the Judges delivered as follows, by

TINDAL C. J. The questions proposed by your Lordships to his Majesty's Judges are these, viz., First, whether it is competent to a court of error to examine the propriety of an amendment of the record made by the court below, being a court of record, the order for the amendment being sent up as part of the record? Secondly, whether, supposing it to be competent, an amendment made by the court of record, in which the action was originally brought, in the manner and under circumstances similar to those stated in the case of *Mellish* v. *Richardson*, would be lawfully made?

Upon the first of these questions, his Majesty's Judges are of opinion, that it is not competent to a court of error to examine the propriety of an amendment of the record made by the court below, being a court of record, although the order for the amendment is sent up as part of the record.

The proper object of a writ of error is to remove the final judgment of the court below for the revision of the superior court, in order that such court, from the premises contained in the record of the inferior court, may either affirm or reverse the judgment, as they draw the same or a different conclusion from that which has been pronounced by the court below.

(*a*) See 2 *Bingh.* 229. 3 *Bingh.* 334. 7 *B. & C.* 819.

These

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(IN THE HOUSE OF LORDS.)

DANIEL GILES, Esquire, late Sheriff of the County of HERTS, *v.* HARRY GROVER and JAMES POLLARD.

Goods of the debtor already seized under a *fi. fa.*, but not sold, may be taken under an extent, in chief or in aid.

THIS case arose upon a special verdict, which was found upon the trial of an issue directed by the Court of Exchequer in *Hilary* term 1824 to be tried between the above parties, and originated in certain proceedings upon a writ of extent, then depending in the said Court.

The declaration stated in substance, that before and at the time of issuing the extent in the said declaration after mentioned, tested the 21st of *August* 1816, *Harry Grover* and *James Pollard* were indebted to his late Majesty King *George* III. in the sum of 1480*l.* 6*s.* 9*d.*, being the said king's money, arising from assessed taxes and property tax, collected and received by the said *Harry Grover* and *James Pollard*, as bankers appointed by the receiver general of taxes for the county of *Hertford*, as by a commission and inquisition remaining of record in the said court appeared: that at the time of issuing the said extent, *Henry Fourdrinier* and *Thomas Nicholls* were indebted to the said *Harry Grover* and *James Pollard* in the sum of 1363*l.* 5*s.* 1*d.* for money lent; which last-mentioned debt had been seized into the king's hands by a certain extent and inquisition previously issued: that an extent had issued on the 21st of *August* 1816 against the said *Henry Fourdrinier* and *Thomas Nicholls*, in the usual form, for the said last-mentioned debt, which was duly delivered to the Plaintiff in error, then being sheriff of the county of *Hertford*, to

to be by him duly executed; and thereupon a question arose between the said Defendants in error and the said Plaintiff in error, whether at the time of issuing the last-mentioned extent, there were any goods and chattels of the said *Henry Fourdrinier* and *Thomas Nicholls*, or either of them, which were liable to seizure under the same extent, and afterwards to be sold for the purpose of satisfying the said debt of the crown, mentioned in the said last-mentioned writ of extent:

The declaration then stated, that the Defendants in error asserted, that there were such goods and chattels; and the Plaintiff in error, that there were not: and

That in consideration that the Defendants in error had paid 5*l.* to the Plaintiff in error, he promised to pay them 10*l.*, if at the time of issuing the same extent there were any such goods and chattels.

It was then averred that there were such goods and chattels, and in the usual form a breach was alleged of the promise above mentioned on the part of the Plaintiff in error.

The Plaintiff in error pleaded, that there were not any such goods and chattels; upon which issue was joined.

The cause came on for trial before the Lord Chief Baron, at the sittings in *Trinity* term 1824, when a jury found a special verdict, which stated in substance as follows: —

That in pursuance of a commission, to enquire whether the said *Harry Grover* and *James Pollard* were indebted to the said late king, and an inquisition thereupon, finding them to be indebted in the sum of 1480*l.* 6*s.* 9*d.*, an extent issued on the said 21st of *August* 1816 to the sheriff of *Middlesex*, to enquire what debts the said *Harry Grover* and *James Pollard* had in the said sheriff's bailiwick.

That by another inquisition taken on the said 21st

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of *August*, before the said sheriff of *Middlesex*, it was found that the said *Henry Fourdrinier* and *Thomas Nicholls* were indebted to the said *Harry Grover* and *James Pollard* in 1368*l.* 5*s.* 1*d.* for money lent; which last-mentioned debt the said sheriff of *Middlesex* had then seized into the said king's hands.

That on the said 21st of *August*, a writ of *non omittas capias ad satisfaciendum* and extent, tested on that same day, issued to the sheriff of *Hertfordshire* against the said *Henry Fourdrinier* and *Thomas Nicholls*, whereby the said sheriff was ordered to enquire what lands, and goods, and chattels the said *Henry Fourdrinier* and *Thomas Nicholls*, or either of them then had; and the said sheriff was thereby ordered to appraise and extend the same, and seize them into the said king's hands till the said debt was satisfied.

That this last-mentioned writ was duly delivered to the said sheriff of *Hertfordshire*, the Plaintiff in error, on the said 21st of *August*.

That before the return of the last-mentioned writ, to wit, on the 21st of *October*, in the year aforesaid, by an inquisition held before the said sheriff, and taken by virtue of the said last-mentioned writ, it was found, that the said *Henry Fourdrinier* and *Thomas Nicholls* were, on the day of issuing the same writ, possessed as of their own proper goods and chattels, of divers goods and chattels within the said sheriff's bailiwick, which were in the said sheriff's custody at the time of issuing the same writ, by virtue of three writs of *fieri facias*, for sums amounting together to 3727*l.*; and of an extent tested the 22d of *July* then last, for 3066*l.* 1*s.* 9*d.*; and of an extent in aid of one *Richard Weedon*, tested the 27th of the said month of *July*, for 650*l.*; all which said goods and chattels, subject to such prior executions and extents, as far as the same were available in law, in preference to the said extent of the date of the

the said 21st of *August*, the said sheriff had taken and seized into his said Majesty's hands.

That the said goods and chattels were at the time of their seizure of greater value than the sums of money directed to be levied by the two extents, tested prior to the said extent of the 21st day of *August*.

That the said sheriff (the Plaintiff in error), at the return of the extent of the 21st of *August*, returned accordingly to the Court of Exchequer, that he had seized the said goods and chattels, subject to such prior executions and extents, into the hands of his said late majesty, as by the said extent of the 21st of *August* he was commanded.

The special verdict then found, that before the issuing and *teste* of the said extent, tested the said 21st of *August*, a writ of *fieri facias*, tested the 3d of *July* in the same year, had issued against the said *Henry Fourdrinier*, at the suit of one *Robert Gatty*, which writ duly indorsed to levy 351*l.* was, on the 8th of *July* 1816, delivered to the said Plaintiff in error, as sheriff of *Hertfordshire*, to be executed; and that he, on that same 8th of *July*, seized and took in execution divers goods and chattels of the said *Henry Fourdrinier*, being part of the goods and chattels mentioned in the inquisition taken on the extent of the 21st of *August*, and of sufficient value to satisfy the sum so indorsed.

That before the issuing and *teste* of the said extent of the 21st of *August*, another writ of *fieri facias*, tested the 7th of *July*, in the same year, had issued against the said *Henry Fourdrinier*, at the suit of one *Luder Hoffman*; which writ, duly indorsed to levy 376*l.*, was delivered to the said Plaintiff in error, as sheriff as aforesaid, on the 8th of the said month of *July*, to be executed, and that he on that same 8th of *July*, seized and took in execution divers goods and chattels of the said *Henry*

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Fourdrinier, being part of the goods and chattels mentioned in the inquisition taken on the said extent of the 21st of *August*, and of sufficient value to satisfy the sum, so as last aforesaid indorsed.

That before the issuing and *teste* of the said extent of the 21st of *August*, another writ of *fieri facias*, tested on the 3d of the said month of *July*, had issued against the said *Henry Fourdrinier* and *Thomas Nicholls*, at the suit of one *Frances Maria Rachel Rougemont*, which writ, duly indorsed to levy 3000*l.*, was delivered to the said Plaintiff in error, as sheriff as aforesaid, on the 21st of the said month of *July*; and that he, on the 22d of the said month of *July*, seized and took in execution divers goods and chattels of the said *Henry Fourdrinier* and *Thomas Nicholls*, being the same goods and chattels mentioned in the said last-mentioned inquisition, and of sufficient value to satisfy the sum so as last aforesaid indorsed.

That before the issuing of the said extent of the 21st of *August*, another writ of *non omittas capias ad satisfaciendum*, and extent, bearing *teste* the 22d of *July*, in the year aforesaid, (and grounded upon a previous inquisition, holden by virtue of a commission in the usual form, by which inquisition it had been found, that the said *Henry Fourdrinier* and *Thomas Nicholls* were indebted to his said late majesty, in the sum of 3066*l.* 1*s.* 9*d.* for duties on paper,) had issued, directed to the said sheriff of *Hertfordshire*, against the said *Henry Fourdrinier* and *Thomas Nicholls*, and was delivered to the said Plaintiff in error, as such sheriff, on the 25th of the said month of *July*; and that, under an inquisition, held before the Plaintiff in error, as such sheriff, it was found that the said *Henry Fourdrinier* and *Thomas Nicholls* were possessed of divers goods and chattels, which were seized by him into the said king's hands, under the said last-mentioned extent, subject to the said writs of *fieri facias*,

and

and were the same goods and chattels as are mentioned in the inquisition taken on the said extent, tested the 21st of *August* aforesaid.

That before the issuing of the said extent of the 21st of *August*, another writ of extent, bearing *teste* the 27th of *July*, in the same year, (reciting, that it had been found by an inquisition, held by virtue of a commission that *Richard Weedon* was indebted to his said late majesty in 650*l*., for duties of excise, and also reciting, that by another inquisition, tested on the said 27th of *July*, the said *Henry Fourdrinier* and *Thomas Nicholls* were found indebted to the said *Richard Weedon* in 650*l*., for work and labour, which debt had been seized into his said majesty's hands,) issued to the sheriff of *Hertfordshire*, against the said *Henry Fourdrinier* and *Thomas Nicholls*, and was delivered to the said Plaintiff in error, as such sheriff, on the 30th of the said month of *July*; and that under an inquisition, held by the said Plaintiff in error, as such sheriff, it was found that the said *Henry Fourdrinier* and *Thomas Nicholls* were possessed of divers goods and chattels, which were seized by him into the said king's hands, under the said last-mentioned extent, subject to the said several writs of *fieri facias* and the said extent, bearing *teste* the said 22d of *July*, and were the same goods and chattels as are mentioned in the inquisition taken on the said extent, tested the 21st of *August* aforesaid.

It was then found by the special verdict, that the said Plaintiff in error, after making the said return to the said extent, tested on the said 21st of *August* in the year aforesaid, that is to say, on the 31st of *March* 1817, sold all the goods and chattels specified in the inquisition taken thereon, for a sum not sufficient to satisfy the said writs of *fieri facias* and the said extents, tested the 22d and 27th of *July* aforesaid, but

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more than sufficient to satisfy the said last-mentioned writs of extent, and paid the proceeds arising from such sale in part satisfaction of the same writs of *fieri facias*, and the said extent of the 22d of *July* aforesaid; and that he did not pay any part in satisfaction of the said writ of extent, tested the 21st of *August* 1816, the whole having been paid and applied by him in part satisfaction of the monies due on the said several writs of *fieri facias*, and the said extent of the 22d of *July* as aforesaid.

The special verdict then stated, in the usual form, that the jury upon the whole matter were ignorant whether there were at the time of issuing the extent of the 21st of *August* aforesaid, any goods and chattels of the said *Henry Fourdrinier* and *Thomas Nicholls*, or either of them, liable to seizure under the same extent, and afterwards to be sold, for the purpose of satisfying the debt of the crown mentioned in the same writ of extent; and prayed the advice of the Court in the usual way upon that point. Upon this special verdict, judgment was given by the Court of Exchequer for the Plaintiffs below, in *Michaelmas* term 1824.

In *Hilary* term 1825, the Defendant below sued out a writ of error returnable in the Council Chamber, nigh the said Exchequer.

The common errors were there assigned, and the Defendants in error joined in error, and in *Hilary* term 1827, the judgment of the Court of Exchequer was affirmed.

The Plaintiff in error afterwards brought a second writ of error, returnable in parliament, upon which the common errors were assigned, and the Defendants in error joined in error.

On the 25th of *May* and 25th of *June* the opinions of eight of the Judges were delivered as follows; and Lord *Tenterden*'s on the 11th of *July*.

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PATTESON J. In this case your Lordships have propounded two questions for the opinions of the judges: — First, a common person brings his action against another, and obtains judgment; issues a writ of *fieri facias* upon that judgment, and delivers the writ to the sheriff, who, in execution thereof, seizes the goods of the Defendant. While the goods remain in the sheriff's hands, and before he has sold them, a writ of extent in aid is issued against the same Defendant as debtor of a debtor of the crown, tested after the seizure under the *fieri facias*, and is delivered to the said sheriff: shall this writ of extent be executed by the sheriff, by extending the same goods, seizing them into the king's hands, and selling them to satisfy the crown's debt, without regard to the writ of *fieri facias* under which he had first seized them? Secondly, all other things remaining the same, does it make any difference whether the writ of extent was in chief or in aid? Upon the first question much difference of opinion has long existed; and there are conflicting decisions of the courts of law. Your Lordships, therefore, will not be surprised to find that the Judges have not been able to agree, and that it has become my duty to state my opinion upon it. I apprehend that the answer to this question depends upon two points: first, whether the property in the goods is so altered by the seizure of the sheriff under the *fieri facias*, that the extent cannot take effect; and, secondly, whether the statute 33 *H.* 8. *c.* 39. *s.* 74. bars the right of the crown. As to the first point, at common law the goods of the debtor were bound from the teste of a writ of *fieri facias* at the suit of a common person, as well as from the teste of the king's writ. This, as to common persons, is altered by the statute 29 *Car.* 2. *c.* 3. *s.* 16., since which they are bound only from the delivery of the writ of *fieri facias* to the sheriff. The crown, however, not being named in that statute,

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goods are still bound from the *teste* of the king's writ. But this binding, in the case both of the king and of a common person, relates only to the debtor himself and his acts, so as to vacate any intermediate assignment made by him otherwise than in market overt. *Philips* v. *Thompson.* (*a*) (*Per* Lord *Hardwicke*, *Lowthall* v. *Tonkins* (*b*), and *per* Lord *Ellenborough* in *Payne* v. *Drewe* (*c*)), and many other cases. And even when made in market overt in the case of the king, it in no way affects the priority of conflicting writs. The rule as to priority between common persons always was, that the writ which was first delivered to the sheriff should be first executed without regard to the teste; but between the king and a subject, that the king's writ, though delivered last, should be preferred on the ground expressed by Lord *Coke* in *Quick*'s case. (*d*) *Quando jus domini Regis et subditi insimul concurrunt jus Regis præferri debet;* and this also without regard to the teste. If, therefore, a writ of *fieri facias* at the suit of a common person be delivered to the sheriff, and before any seizure made by him under that writ, a writ of extent at the suit of the king, tested after the delivery of the *fieri facias*, be delivered to him, it is not doubted but that the sheriff would be bound to execute the writ of extent in preference to the *fieri facias*. In the case, indeed, stated by your Lordships, the sheriff had already seized under the writ of *fieri facias*, before the writ of extent was delivered to him. What then is the effect of that seizure? If by it the writ of *fieri facias* is executed, if the rights of the king and of the subject no longer run together, if the property of the goods be taken out of the debtor, then the writ of extent is too late, it has nothing on which to operate. But if the seizure of the goods be but an inception of the execution, if the rights of the

(*a*) 3 *Lev.* 191.
(*b*) 2 *Eq. Cas. Ab.* 381.
(*c*) 4 *East*, 538.
(*d*) 9 *Rep.* 129 *b.*

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king and the subject are still conflicting, if the general property in the goods still remain in the debtor, then the maxim will still apply, and the king's right must be preferred.

It is not pretended in any of the authorities, except in some supposed loose dicta, that by seizure of the goods, any property therein is acquired by the creditor: so far is this from being the case, that when goods were seized by the sheriff under one writ, (which had been last delivered,) it was held that he might sell under the writ of another creditor which had been first delivered, but under which he had not seized: *Hutchinson* v. *Johnston.* (*a*) Now, if the seizure under a writ of *fieri facias* executed the writ, if it changed the property and vested it in the creditor, how came it that the sheriff, having seized under the second writ, was not compelled to sell under that writ? It cannot be said that the reason was, because the property was bound and altered by the delivery of the first writ, and, therefore, the goods could not be taken under the last, since it was held in *Payne* v. *Drewe*, that if the sheriff sell under the writ last delivered, the creditor, whose writ was first delivered, cannot follow the goods or their proceeds, though he has his remedy against the sheriff: and the same point had long before been determined in *Smallcombe* v. *Cross* (*b*), and other cases. It seems to me, to be clear from these cases, that the seizure of goods by the sheriff will not make any difference as to the rights of creditors under conflicting writs, any more than the teste of the writ does, and will not vest any property whatever in the creditor under whose writ the seizure is made in the case of common persons; why then should it make any difference in the case of the crown and a subject?

(*a*) 1 *T. R.* 729. and see *Jones* v. *Atherton*, 7 *Taunt.* 56.

(*b*) 1 *Ld. Raym.* 251. 1 *Salk.* 320.

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It is true, that in one report of the case of *Wilbraham* v. *Snowe* (*a*), Lord C. J. *Kelynge* is made to say, "the property is altered from the owner and given to the party at whose suit." But the reporter adds a *quære*; and the other reports of the same case do not mention this supposed dictum. Again, in one report of *Clerk* v. *Withers* (*b*), *Gould* J. is made to refer to this supposed dictum of Lord C. J. *Kelynge*; but, in another report of the same case (*c*), *Gould* J. is made to say, only that Lord C. J. *Kelynge* held in *Wilbraham* v. *Snowe*, that the sheriff gained a general property by seizure, whereas the other Judges held that he gained a special property only; and *Powys* J. is made to say, that the general property remained perhaps in abeyance. All which shews only the inaccuracy of the reporters on the doubtful grounds of the decision; and, as a special property in the sheriff, is quite sufficient ground to warrant the decision, no other ground beyond that can be reasonably taken to have been established. That the general property in goods, even after seizure, remains in the debtor, is clear from this, that the debtor may, after seizure, by payment suspend the sale and stay the execution, *The King* v. *Bird* (*d*), and have back his goods without any bill of sale, or assignment from the sheriff or creditor. And, again, that if the sheriff, after selling a sufficient quantity of the goods seized to satisfy the debt, proceed to sell more, trover will lie against him at the suit of the debtor. But if the property by seizure is taken out of the debtor, it must be so taken as to all the goods seized; and what has operated to restore it? Still it is said, that by the seizure, a special property vests in the sheriff, and that this is an alteration of property sufficient to protect the rights of the execution creditor, and to prevent the crown from taking otherwise than

(*a*) 1 *Lev.* 282.
(*b*) 2 *Ld. Raym.* 1075.
(*c*) 6 *Mod.* 290.
(*d*) *Show.* 87.

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subject to those rights. It is undoubtedly true, that the sheriff does, by the seizure, acquire a special property in the goods. He may maintain trespass or trover for them; *Wilbraham* v. *Snowe* (*a*), *Mildmay* v. *Smith* (*b*); he is answerable to the creditor if they be rescued; and he is bound to sell them; *Clerk* v. *Withers.* (*c*) But on full consideration, it seems to me that this property vested in the sheriff by seizure, is merely that which results from his being the appointed officer of the law, and to enable him to sell the goods and raise the money, not that thereby the property is taken out of the debtor. The goods are, in substance, *in custodia legis*, the seizure made by the officer of the law is for the benefit of those who are by law entitled, it is made against the will of the debtor, and no property is transferred by any act of his to the sheriff. In this respect it differs from all cases of special property, and of charges on goods created by the debtor while he has the absolute dominion over the goods. It is conceded, that the crown cannot avoid an equitable mortgage; *Casberd* v. *Attorney-General* (*d*): or the lien of a factor; *The King* v. *Lee* (*e*): or of a wharfinger; *The King* v. *Humphrey* (*g*): or a *bonâ fide* assignment in trust for creditors; *The King v. Watson* (*h*): or any other similar assignment or charge; because they are created when the debtor has legal power and authority to create them, and attach upon the goods before the process of the crown, and the crown can only take the goods subject to such liabilities as the debtor has legally created. In the case, however, of a seizure by the sheriff, the debtor has created no liability, and the crown has a right to say that the sheriff, whilst the goods

(*a*) 3 *Saund.* 47. 1 *Sid.* 438. 1 *Vent.* 52. 1 *Keb.* 282. 1 *Mod.* 30. 2 *Keb.* 588. *S. C.*

(*b*) 2 *Saund.* 343.

(*c*) 2 *Ld. Raym.* 1075. 6 *Mod.* 290. 11 *Mod.* 34. *Salk.* 322. *Holt*, 303. 646. *S. C.*

(*d*) 6 *Price*, 411.

(*e*) 6 *Price*, 369.

(*g*) 1 *M'Cleland & Younge*, 173.

(*h*) *West on Extents*, 115.

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are in his hands, holds them for the benefit of any one who may have a legal charge against them as the property of the debtor. One instance, apparently shewing that a *fieri facias* is executed by seizure of the goods, is, that of the bankruptcy of the debtor after seizure and before sale, in which case the assignment of the commissioners does not pass the property in the goods to the assignees, although it relates back to the act of bankruptcy, and although the words of the statute 21 *Jac.* 1. *c.* 19. *s.* 9. respecting the distribution of bankrupts effects, compels creditors upon judgments, whereof there is no execution or extent served and executed upon the lands or goods before the bankruptcy, to come in *pari passu* with other creditors. And even a fraction of a day is made in favour of the *fieri facias*: *Thomas* v. *Desanges.* (*a*) It is argued, therefore, that the courts of law, by holding that seizure under an execution before an act of backruptcy, prevents the execution creditor from being driven to come in with the other creditors, have, in effect, held that by such seizure the execution is served and executed. Now, it is to be observed, that at the time of the passing the 21 *Jac.* 1. goods were bound from the *teste* of a *fieri facias* as against the debtor's own acts, and it seems not improbable that this provision of the statute might be intended to guard against creditors who might have sued out a writ, and so bound the debtor's goods, but still abstained from putting it in force till after an act of bankruptcy, which would be in conformity to the principle of the subsequent sect. 11., as to goods in possession of the bankrupt by consent of the true owner. Besides, the goods when seized, are the goods of the debtor; and if the effect of the seizure were to be done away with by a subsequent act of bankruptcy, it would enable the debtor, by his own act, to

(*a*) 2 *B.* & *A.* 586.

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defeat the creditor. The Courts, therefore, have construed the words in that act as applying to a seizure, and not to a sale. At all events, whether this conjecture be right or wrong, the decisions amount only to a construction of words in a particular act of parliament with reference to the scope and object of the act, and cannot affect the general law; and it is also to be remembered that the crown is not mentioned in, or bound by that act. The case of *Clerk* v. *Withers* (*a*) is also pressed as establishing the doctrine that the property is taken out of the debtor by the sheriff's seizure; but no such doctrine is there laid down.

The facts of the case were shortly these: an administrator recovered a judgment by default against *Clerk*, he sued out a *fieri facias*, and *Withers*, the then sheriff, seized *Clerk*'s goods. Before sale the administrator died, then *Clerk* sued *Withers* (who had gone out of office in the meantime) to have restitution of his goods, contending that, as the Plaintiff was an administrator, his executor or administrator could not have the benefit of the judgment, and that any new administrator *de bonis non* could not, because the judgment was by default. Another point was raised, which is not material here, as to *Withers* having quitted office. After much argument it was held, that the action would not lie, because *Clerk* was discharged from the debt by the seizure of the sheriff *ad valentiam*, and that the sheriff having seized in the lifetime of the Plaintiff, must account to his representative. All this is perfectly consistent with the position, that the general property in the goods, even after seizure, remained in *Clerk*, and establishes only that the debtor himself cannot defeat an execution once begun, nor get back his goods after a seizure under a *fieri facias*, without payment of the debt.

(*a*) 2 *Ld. Raym.* 1072., 6 *Mod.* 290., and other places.

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It is argued, also, that when goods are once seized under a *fieri facias*, the sheriff must go on to perfect the execution; and that even a writ of error will not operate as a *supersedeas*. The cases to establish this position are somewhat confused; but, admitting it to be established, the doctrine of change of property does not follow, for the bringing the writ of error is here also the act of the debtor himself. For these reasons, and on the authority of the cases I have mentioned, and some others to which I must refer hereafter, I conceive that the property in the goods is not so altered by the seizure of the sheriff under the *fieri facias* as that the extent cannot take effect.

I come now to consider what is the effect of the statute 33 *Hen.* 8. *c.* 39. *s.* 74. Premising that it appears to me somewhat doubtful whether that section applies to any writ of extent issued in the first instance, commonly called an immediate writ of extent, and whether it was not intended to apply only to the king's writs of execution after judgment, or award of execution obtained by him in a suit, I am of opinion that, if it does apply to such an extent as the present, it does not, under the circumstances stated, prevent its priority. That statute created certain new courts, and it must be admitted that it gave the king some new rights; for the fiftieth section gives to bonds made to the king the effect of statutes staple; and the fifty-third section gives the king the same remedy on those bonds as the subject had had on statutes staple. Then, after various other matters, comes the seventy-fourth section, at a great distance, and it is this: "That if any suit be commenced or taken, or any process be hereafter awarded for the king, for the recovery of any of the king's debts, that then the same suit or process shall be preferred before the suit of any person or persons. And that our sovereign lord the king, his heirs and successors, shall have first

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first execution against any defendant or defendants of and for his said debt, before any other person or persons, so always, that the king's suit be taken or commenced, or process awarded for the said debt, at the suit of our said sovereign lord the king, his heirs or successors, before judgment given for the said other person or persons."

Now, in order to arrive at the true meaning of this clause, I think we must look at the state of the law before and at the time of the passing of the act. At common law the king might, by his writ of protection, prevent any subject from suing his debtor at all until the king's debt was satisfied. *Co. Lit.* 131. By statute 25 *Edw.* 3. *c.* 19. it was provided, that notwithstanding such writs of protection, the subject creditor might sue the debtor to judgment, but not have execution till the king's debt was satisfied; and if the creditor would undertake for the king's debt, he should then have execution both for it and his own. Such writs of protection have long since ceased, and Lord *Coke* says, that he cannot say any thing of them for his own experience, but there is no doubt that they were in use at the time of the passing 33 *Hen.* 8., that act having, by the fiftieth section, made bond debts to the king binding on the land of the debtor from the date of the bond, which they were not before. The seventy-fourth section seems to have been inserted for the benefit of the subject, primarily with a view to land, and so as to prevent the king's bonds from binding the land as against the judgment of a subject, which also bound the land, unless the king, by putting his bond in force before such judgment obtained, had expressed his intention so to bind the land; but the seventy-fourth section was also inserted, as it seems to me, with a reference to the very prerogative of the king, of preventing the execution of the subject; and so, having first execution himself, restricted as it was by

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by 25 *Edw.* 3. *c.* 19.; and in this view it applies to all proceedings for recovery of the king's debts, and to executions against goods as well as lands; and it abridges the power of the crown, as it has been considered to do in *The Attorney General* v. *Andrew.* (*a*) For since the 33 *Hen.* 8. the crown cannot interpose and prevent the subject's execution, when he has obtained judgment before the crown process is awarded: but in that case the subject may sue out his execution, and reap the fruits of it, if he can sell before the king's execution comes into the sheriff's hands. By obtaining a judgment before the crown process awarded, the subject entitles himself to run a race with the crown, so to speak, which he could not do before the stat. 33 *Hen.* 8. nor, as I apprehend, can do even now, where he has not so obtained judgment. Although in all cases, according to *The Attorney General* v. *Fort*, reported in a note to *The King* v. *Giles* (*b*), if the crown suffers the goods to be sold under a *fieri facias* before it interposes, its process is too late, whether sued out before or after judgment obtained by the subject. The stat. 33 *Hen.* 8. only, as I humbly conceive, enables the subject to run a race with the crown in certain cases, but it leaves the issue of that race to depend on the common law maxim, which I stated long ago, "*Quando jus domini regis et subditi insimul concurrunt jus regis præferri debet,*" which maxim is not denied, and is established by numerous cases. Otherwise, if the words of the seventy-fourth section are to be taken in their literal sense, this absurd consequence, among others, would follow; that if a subject obtained judgment, but did not take out execution for six months, another subject might in the interim commence a suit, proceed to judgment, take out a *fieri facias* and deliver it to the sheriff, and so obtain priority;

(*a*) *Hardr.* 27. and in 7 *Rep.* 92. *Cecil's* case, and other cases.

(*b*) 8 *Price*, 364.

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ority; but that the crown could not: or, as it is well put in the argument in *Rorke* v. *Dayrell* (*a*), if *A.* recover judgment against the king's debtor on the 1st of *January*, but do not deliver his writ of execution till the 4th, and *B.* also recover judgment against the same person on the 3d, and deliver his writ on the same day, and on the 2d an extent issues at the suit of the crown, and is delivered to the sheriff, according to the construction contended for this absurdity would follow, that the king would not be preferred as against *A.*, though he would as against *B.*, and yet it must be admitted that *B.* is entitled to a preference against *A.* The literal meaning of the words of this section cannot, therefore, be adopted; nor am I able to see any construction that can reasonably be put upon the statute other than that which I have imperfectly expressed, but will be found infinitely better stated in Mr. Baron *Graham*'s judgment in this very case (*b*), and in Lord Chief Baron *Macdonald*'s judgment in *The King* v. *Wells and Allnutt*. (*c*) Mr. *West* says, in his book on extents, p. 108., that the statute 33 *H.* 8. gave the crown a new kind of execution for all its debts, a species too of execution which before the statute was the subject's, and the subject's only. This he deduces from the fiftieth and fifty-third sections of that act. I think that he is wrong in that view of the statute, and that the proceeding by extent in the first instance at the suit of the crown existed long before the statute of 33 *H.* 8. and was only modified and restricted by that act. But whether he be right or wrong is not, in my humble opinion, material, for even if he be right, I still hold that the true construction of the statute is that which I have already expressed.

(*a*) 4 *T. R.* 406.
(*b*) 8 *Price*, 362.
(*c*) Reported in a note to *Thurston* v. *Mills*, 16 *East*, 278.

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I will now proceed to consider some of the cases in which the question has arisen or been discussed. And, first, the case of *Uppom* v. *Summer*. (*a*) In that case the sheriff, on the 18th of *April*, seized one *Cann*'s goods under a *fieri facias* at the suit of *Uppom*, the plaintiff, returnable on the 12th of *May*. On the 24th of *April*, before sale, an extent was sued out and delivered to the sheriff. The sheriff sold under the extent and returned *nulla bona* to the *fieri facias*, upon which *Uppom* brought his action for a false return. A verdict was taken for the plaintiff, subject to the opinion of the Court of Common Pleas on a case. The plaintiff's counsel first admitted that they could not support their case, and the verdict was set aside; but afterwards, on their application, the Court let them in to argue it. It was argued by Serjeant *Walker*, for the plaintiff, who put the case on the statute 33 *H.* 8. *c.* 39. The judgment was given by *Gould* J. in *Easter* term 9 *G.* 3., delivering the opinion of Lord C. J. *De Grey*, himself, *Nares*, and *Blackstone* Js. He grounds his judgment, first, on the statute of 33 *Hen.* 8., as to which I have already spoken: and, secondly, on authorities which I will proceed to examine. He first distinguishes *Stringefellow*'s case (*b*), as not having arisen on a judgment, but on a statute staple, and, therefore, not being within the provisions 33 *Hen.* 8.; and then relies on the cases of *Lechmere* v. *Thoroughgood* (*c*), and *The Attorney-General* v. *Andrew* (*d*), and on a passage in Lord C. J. *Comyns's Digest*, tit. *Debt*, (G 8.), who, after reciting 33 *Hen.* 8., says, "Therefore, if execution be upon a judgment against the king's debtor, and before a *venditioni exponas*, an extent comes at the king's suit, those goods cannot be taken upon the extent;" and cites for this

(*a*) 2 *Bl.* 1251. 1294.
(*b*) *Dyer*, 67 *b*.
(*c*) 3 *Mod.* 236.
(*d*) *Hardr.* 23.

position

position the two cases just above mentioned. And *Gould* J. also mentions the case of *The King* v. *Dickenson.* (*a*) That was a question as to the administration of assets, in which the point decided was, that a judgment creditor of the deceased should be preferred to a simple contract creditor, who, being a debtor to the crown, had, after the death of the deceased, procured an extent in aid. A case wholly foreign to the question in *Uppom* v. *Summer*. The authorities, therefore, on which Lord C. B. *Comyns* and *Gould* J. rely, are reduced to the two before mentioned, *Lechmere* v. *Thoroughgood*, and *The Attorney-General* v. *Andrew*. *Gould* J. says, that the former of these cases is obscure, arising from its being reported piecemeal, and in different books, and recommends reading them in order of time, as they occur, viz. the pleadings 2 *Jac.* 2., 2 *Ventr.* 159.; the first argument, 4 *Jac.* 2., 3 *Mod.* 236.; the second argument and judgment, 1 *W. & M.*, *Comb.* 123. 1 *Show.* 12.; and a subsequent action between the same parties, in effect, in the Common Pleas in *Lechmere* v. *Toplady*. (*b*) I have read them all in that order, and although there are some loose dicta and extra-judicial matters stated, yet it is easy to find out what points were really determined; and they were simply these: first, that in an action of trespass by assignees of a bankrupt against a sheriff who had seized goods under a *fieri facias* after a secret act of bankruptcy, the sheriff could not be made a trespasser by relation: this was *Lechmere* v. *Thoroughgood:* and, secondly, that in an action of trover for the same seizure against the execution creditor, the judgment for the sheriff in the action of trespass was a good bar by way of estoppel: that was *Lechmere* v. *Toplady*. I do not mean to say that I at all agree to the decision on the last point; but it was the point decided, and the only

(*a*) *Parker*, 262. (*b*) 2 *Ventr.* 169.

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point. With respect to *Lechmere* v. *Thoroughgood*, the facts were shortly these: — The sheriff seized goods of one *Toplady*, on the 29th of *April*, under a *fieri facias*, after a secret act of bankruptcy, committed on the 28th of *April*; and, whilst the goods remained in his hands unsold, *viz.*, on the 4th of *May*, an extent at the suit of the crown against *Toplady* was delivered to him. On the 5th of *May*, a commission of bankruptcy issued against *Toplady*, under which the Plaintiffs were appointed assignees, and sued the sheriff in trespass. A special verdict was found, and it was held that the action would not lie. Some of the reports say, that it was held that the extent came too late; but this point could not have been determined; for the crown was no party to the suit, and was not heard; therefore no right of the crown could be decided in it. Again, the crown and the execution creditor were on the same side; the sheriff, the defendant, having seized for both: no point, therefore, as between them, could arise in the case, especially as the defendant succeeded, because it was held that the sheriff could not be made a trespasser by relation. All the reports agree in stating that to be the point decided: even *Comberbach* so states, although he makes Lord *Holt* C. J. say, "The property in goods is vested by the delivery of the *fieri facias*, and the extent afterwards for the king comes too late, and this by the statute of frauds and perjuries." This must be a mistake: it is contrary to Lord *Holt*'s own position in *Smallcomb* v. *Cross* (*a*). It is wholly beside the question before him, and makes him consider the statute of frauds as binding on the king, who is not named in it. Lord *Mansfield*, in *Cooper* v. *Chitty*, (*b*) says, that Lord *Holt* could never say that the property in the goods vested by the delivery of the *fieri facias*, and that the

(*a*) 1 *Ld. Raym.* 251. (*b*) 1 *Burr.* 20.

extent

extent for the king afterwards came too late, and adds, — "No inception of an execution can bar the crown:" and Lord *Ellenborough* also points out the inaccuracy of *Comberbach* very forcibly in *Payne* v. *Drewe*. (*a*)

With respect to the case of the *Attorney General* v. *Andrew* (*b*), it is quite apparent, from a perusal of that case, that the execution, which was by *elegit*, was perfected and completed by delivery of the lands before the king's writ issued; and then, as Lord C. B. *Steel* says, "the subject's title is prior to the king's, and is executed." The same law and the same consequences have since been held to attach in *The Attorney General* v. *Fort*, (*c*) and in *Swain* v. *Morland*. (*d*) These two cases cited do not, therefore, bear out the position of Lord C. B. *Comyns*, nor the decision in *Uppom* v. *Sumner*; and that decision must be supported if at all on the statute 33 *Hen.* 8., on which I have already remarked.

The next case is *Rorke* v. *Dayrell* (*e*): that case was decided principally on the authority of *Uppom* v. *Sumner*, and the authorities there cited; and if they are shewn to be wrong, the decision in *Rorke* v. *Dayrell* is wrong also. Lord *Kenyon* puts the case on the ground of change of property; for, he says, "That as long as the property of the debtor remains unaltered, and an execution at the suit of a subject, and an extent at the king's suit issue against the debtor, the title of the latter must prevail: for the point to be considered in these cases is, in whom is the property?" He adds, "I have always understood it to be clear and settled (and this question has very frequently occurred in the

(*a*) 4 *East*, 539.
(*b*) *Hardr.* 27.
(*c*) Reported in a note to 8 *Price*, 364.
(*d*) 1 *Bro. & Bingh.* 370.
(*e*) 4 *T. R.* 402.

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Exchequer), that if an extent at the suit of the crown be tested prior to the time when the subject's execution is delivered to the sheriff, the former shall have the preference. But as, by the common law, abridged as it is by the statute of frauds, the property of the debtor's goods is bound by delivery of the writ to the sheriff, there then remains no property in the debtor on which the prerogative of the crown can attach." Now, with all possible respect for every thing which fell from Lord *Kenyon*, I humbly conceive that he has here confounded the binding the property in goods, and the alteration of the property, and that he is mistaken in supposing that the property in goods is or ever was at all bound or altered, either by the *teste* or delivery of the writ, as regards conflicting writs; and that the binding is only as regards the debtor himself, as I have before shewn; and if so, the very foundation of his judgment fails. The other judges put the case on the stat. 33 *Hen.* 8.

These are the only decisions in favour of the subject's execution: for *Thurston* v. *Mills* (*a*) went off on another point. Against them are the uniform decisions of the Court of Exchequer; one of which is reported at length, *viz.*, *The King* v. *Wells and Allnutt*, in the note to *Thurston* v. *Mills*. (*b*) This is subsequent to both *Uppom* v. *Sumner* and *Rorke* v. *Dayrell*, which are cited and relied on in argument. Now, without fully agreeing to every word that is said by Lord C. B. *Macdonald*, in giving the judgment of the Court, (some of whose positions according to the letter, I confess, appear to me untenable,) I, for one, am perfectly satisfied with the general reasons given in that judgment. The same point was again discussed and decided in *The King* v. *Sloper and Allen* (*c*), which is still later.

(*a*) 16 *East*, 254.
(*b*) 16 *East*, 278.
(*c*) 6 *Price*, 114.

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sheriff to deliver in the one case, whereas in the other he may and ought to sell without a *venditioni exponas*; but this difference cannot vary the effect of the seizure. The principle established in *Stringefellow*'s case, is, in the words of Lord *Mansfield*, that no inception of an execution can bar the crown. *Stringefellow*'s case was against the opinion of some of the profession at the time, but it has been recognized as good law many times since, and seems to me to be directly in point. Next comes *Curson*'s case (*a*), which only shews that after delivery under a *liberate* the king's writ is too late. In *The King* v. *Peck* (*b*), it was taken for granted that if an extent comes after seizure under a *fieri facias* and before sale, it shall be preferred.

In *The Attorney-General* v. *Capel* (*c*), the point decided arose out of a bankruptcy, the king's writ being preferred after an act of bankruptcy, and before assignment by the commissioners. It is not in point to the present question; but at the end of the judgment are these words: — "Extents have been held good that have been made upon goods actually levied by virtue of a *fieri facias*, and in the sheriff's custody; the extent coming before a bill of sale made, so as the property was not altered."

Also in *Smallcomb* v. *Buckingham* (*d*), which is the same case as is elsewhere called *Smallcomb* v. *Cross*, there is a *dictum* to the same effect: and many others in other places: all which *dicta* I merely notice to put them in opposition to other *dicta* as to the vesting and alteration of property by seizure. Lastly comes the case of *The King* v. *Cotton*. (*e*) That was the case of goods seized under a distress for rent; and it was held

(*a*) 3 *Leon*, 239. 4 *Leon*. 10.
(*b*) *Bunb*. 8.
(*c*) 2 *Show*. 480.
(*d*) 5 *Mod*. 376.
(*e*) *Parker*, 112.

that

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that they were still liable to be taken under an extent at the suit of the king, though in the custody of the law, and therefore privileged from being taken in execution by a subject. It is said that this case is not in point, because no property at all in the goods is gained by the distrainor, who can neither maintain trespass nor trover for them; and that such is the ground of the decision, inasmuch as it lay on the claimant in the Exchequer to prove property in himself against the crown. Now, on looking at the whole of the elaborate judgment of Lord C. B. *Parker* in that case, I do not find that he puts the case on the form of the pleading, but on the general principle that the property is not altered, and therefore the king has preference: and throughout his judgment he cites cases as to the effect of seizure under a *fieri facias*, proceeding upon that principle. I consider, therefore, that this case is a strong authority upon principle, unless it can be shewn that seizure by the sheriff alters the property; and I submit that the contrary has been shewn. It is true that neither *Stringefellow*'s case nor *The King* v. *Cotton* are direct authorities with regard to the statute 33 *Hen.* 8.; because in neither of them had the subject obtained judgment. Upon the whole, then, whether with reference to the statute 33 *Hen.* 8., or independent of it, the main points appear to me to be, was the property changed by the seizure? and were the king's writ and the subject's concurring? I say, that the property was not changed, and that the writs were concurring.

My answer, therefore, to the first of your Lordship's questions is, that, in my opinion, the writ of extent shall be executed by the sheriff, by extending the same goods, seizing them into the king's hands, and selling them to satisfy the crown debt, without regard to the writ

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writ of *fieri facias* under which he had first seized them.

With regard to the second question, I find it uniformly considered that (when once it has issued) an extent in aid has all the force and all the incidents of an extent in chief; and therefore I am of opinion that, all things remaining the same, it does not make any difference whether the writ of extent was in chief or in aid.

ALDERSON J. The first question proposed by your Lordships for our consideration is in substance this: — Whether, when goods seized by a sheriff, under a writ of *fieri facias* remain in his hands unsold, a writ of immediate extent tested after such seizure does, upon its delivery to such sheriff, entitle the crown to a priority of execution: and after fully considering that question, I have arrived at the conclusion that it must be answered in the affirmative.

This subject has been for a long period *vexata questio* in our courts. And in order the more clearly to explain the grounds on which my opinion is founded, it will be useful to advert, in the outset, to the extent of the prerogative of the crown as to its debts, and the principles on which that prerogative depends; and then to proceed to examine the authorities, and the reasons assigned for those determinations which are to be found in our books on this point.

The prerogative of the crown as to its debts is laid down in various books, and cannot, I apprehend, be doubted. Lord *Coke*, in *Harbert*'s case (*a*), states "that, at the common law, the body, land, and the goods of the accountant, or the king's debtor, were liable

(*a*) 3 *Rep.* 12.

to

to the king's execution:" and he adds, that there were "infinite precedents in the Exchequer" to prove this, antecedent to the 33 *Hen.* 8. *c.* 39. Lord Chief Baron *Gilbert* also, in his History of the Exchequer, lays it down that the second summons of the pipe is "in the nature of a *levari facias* against the body, lands, and goods of the debtor:" and in *Foster* v. *Jackson* (*a*) the law is very clearly laid down thus: — "It is a prerogative to the king to have execution of body, lands, and goods; not communicated to the subject but in case of statute merchant and statute staple, and recognizance of that nature; which is by the statute law; and, therefore, the case put in *Bloomfield*'s case, that where the party was taken in execution upon a statute and died, and yet execution was had against goods and lands after, is nothing in this case, for they were all due at the first, and therefore may be taken at once or severally." And in *Madox's History of the Exchequer*, vol. 2. p. 183. and subsequent pages, a great variety of instances confirmatory of this passage of Lord *Hobart* in all its parts will be found.

I have cited this passage from Lord *Hobart* at full length, because I shall have occasion again to refer to it in considering the true construction which ought to be put on the statute 33 *Hen.* 8., and because I think it will be found to afford a sufficient clue to enable us to discover what was the real change in the law produced by that statute as to the prerogative of the crown.

It is unnecessary to cite other authorities on this subject. The result of them all being, as I conceive, that the king at common law, by his prerogative, could either by one writ, or by successive writs, as he might find it convenient, seize the body, lands, and goods of his debtor: and further, that this was originally a pre-

(*a*) *Hob.* 60.

rogative

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rogative peculiar to the crown, but afterwards extended to the subject, viz. as to the body of the debtor, by the statute of *Marlebridge*, *c.* 23., the statute *Westm.* 2. *c.* 11., and the statute 25 *Edw.* 3.; and to the lands by the statute *Westm.* 2. *c.* 18.; and in the cases of statute merchant and statute staple, and recognizance in nature of statute staple, by 13 *Edw.* 1. 27 *Edw.* 3. and 23 *H.* 8. *c.* 6., to the body, lands, and goods.

The next prerogative of the crown about which I apprehend there is no dispute is, that where the right of the crown and the subject concur, that of the crown is to be preferred (*a*); a prerogative depending first on the principle that no laches is to be imputed to the king, who is supposed by our law to be so engrossed by public business as not to be able to take care of every private affair relating to his revenue; *Gilb. Hist. Exchequer*, 110.; and, secondly, on the ground that by the king is in reality to be understood the nation at large, to whose interest that of any private individual ought to give way. In the quaint language of Lord *Coke*, *Thesaurus Regis est firmamentum pacis et fundamentum belli.* And until restrained by various enactments of the statute law, this prerogative extended to prevent the other creditors of the king's debtor from suing him, and the king's debtor from making any will of his personal effects without special leave first obtained from the crown. But without further adverting to this ancient state of the prerogative, it is clear that at this day the rule is, that if the two rights come in conflict, that of the crown is to be preferred.

If, however, the right of the subject be complete and perfect before that of the king commences, it is manifest that the rule does not apply, for there is no point of time at which the two rights are in conflict; nor can

(*a*) 9 *Rep.* 129. *b.*

there

there be a question which of the two ought to prevail in a case where one, that of the subject, has prevailed already. But if whilst the right of the subject is still in progress towards completion, the right of the crown arises, it seems to me that the two rights do come into conflict together at one and the same time, and that the consequence in that case is that the right of the crown ought to prevail. Lord *Mansfield* expresses this proposition in shorter language when he says, "No inception of an execution can bar the crown:" *Cooper* v. *Chitty*. (*a*)

Now, if we proceed to apply these principles to the determination of the present case, it will appear that the material facts are these: *J. S.* has obtained judgment against a crown debtor, has issued a *fieri facias* upon that judgment, and has delivered the writ to the sheriff, and the sheriff, in execution thereof, has seized the goods of the crown debtor: the question then is this, Is the right of the subject perfect at the time when the goods are seized by the sheriff, or is there any further act to be done in order to make that right consummate?

The most simple criterion of this seems to be, whether, without any thing further being done, the execution creditor is entitled to call upon the sheriff for the possession of the goods or to pay him the debt. Now, I do not believe that it was ever contended, that the execution creditor is entitled to the possession of the goods themselves, unless under some contract made between the sheriff and him, which would be equivalent to a sale under the writ. Nor can he call upon the sheriff, even after a return of goods seized *ad valentiam*, to pay to him the debt for which the levy is made. If he could, it would be utterly useless to empower him to require

(*a*) 1 *Burr.* 36.

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the sheriffs afterwards to proceed to a sale by the writ of *venditioni exponas*. In fact, it is clear, that all he can do, even after such return, is to compel the sheriff to proceed to sale by ulterior process from the courts. There are many authorities founded on this principle, which shew that a seizure of goods, *ad valentiam*, is only a temporary bar to the execution creditor, so long as the goods remain unsold in the sheriff's hands. Again, if the goods after seizure are destroyed by unavoidable accident, the loss falls upon the debtor. The principle is, that the sheriff is excused where the execution fails altogether without his fault. And, in that case, according to the doctrine laid down in *Foster* v. *Jackson* (*a*) by Lord *Hobart*, the creditor may have a fresh writ of *fieri facias*, and the loss falls on the debtor. There is a third criterion, which is this, that the debtor, on tendering the amount for which the levy is made and the sheriff's charges thereon, is entitled to have a return of the goods seized by the sheriff.

From these premises, two propositions seem to me to follow; first, that at no period of time at all does the execution creditor obtain any property whatsoever in the goods themselves; and, secondly, that the general property in the goods seized remains, until the sale, in the debtor, and is not changed by the seizure: *Milton* v. *Eldrington* (*b*). After sale the case is very different; for, by the sale, the property is wholly changed from the debtor to the vendee of the sheriff, and the money, the produce of the goods, then becomes the property of the creditor; for which he may maintain an action for money had and received, and for which the sheriff is responsible to him, the original debtor being then wholly and finally discharged: *Perkinson* v. *Gilford*. (*c*) The rule is thus expressly laid down by Mr. Baron *Garrow*,

(*a*) *Hob.* 60. (*b*) *Dyer.* 98 *b.* (*c*) *Cro. Car.* 539.

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in delivering the opinion of the Court, after full consideration in the case of *Higgins* v. *M'Adam*. (*a*) "The rule is, that when execution is executed, the property is changed; and execution is said to be executed when a sale has taken place." It is not, therefore, till after the sale, that the right of the execution creditor becomes consummate. And it would follow, from thence, that it is not till after the sale that the right of the creditor ceases to concur with the right of the crown. If, therefore, the right of the crown arises at any period prior to the sale, it seems to me, that on the principles above laid down, it ought to have the preference. A preference depending on similar grounds, and terminating at the same period, seems to me to be fully recognized by the Court of King's Bench in *Hutchinson* v. *Johnston*. (*b*) That was the case of two conflicting executions. The sheriff had seized under the writ last delivered to him; but, before sale, having discovered that another writ which was entitled to priority had been first delivered to him, he made sale under it, and paid the surplus only to the creditor under the second writ under which he had seized. And the Court expressly decided, that until sale, he had a right so to do: but, after sale, not; *Rybot* v. *Peckham* (*c*) being an express authority to that effect. And, it is observable, that many of the authorities which are relied on in the present case were then cited. In particular, the case of *Clerk* v. *Withers*. (*d*) And the very proposition now before your Lordships for decision, it is to be observed, was urged as clear law by the very eminent persons who argued that case, viz. that, till sale, the extent prevails over the prior execution. And, I apprehend that, prior to the statute of frauds, if a subject's writ of execution

(*a*) 3 *Younge & J.* 1.
(*b*) 1 *T. R.* 729.
(*c*) 1 *East*, cited in notes, 731.
(*d*) *Salk.* 322.

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had come to the sheriff after seizure, but before sale, under a writ of a subsequent teste, the sheriff would have been in like manner justified in executing it before the other writ under which he had seized, and would have been liable to an action on the case if he had omitted to do so. These authorities seem to me to shew clearly, first, that no property passes by the seizure from the original debtor to the creditor; and, secondly, that even in the case of conflicting rights, as between subject and subject, the point of time which the courts uniformly look at, the period when the execution is consummate, is not the seizure, but the sale under the writ.

There is one case, however, which requires some observation, as it would seem to trench upon this proposition; I allude to the construction put by the courts upon the ninth section of the 21 *Jac.* 1. *c.* 19. There is no doubt that the courts have held, that the seizure under a writ of *fieri facias* was sufficient to satisfy the words "execution, or extent served and executed," contained in this statute; and that, for the purpose of protecting the execution creditor from the effect of a prior act of bankruptcy. But this was a decision upon the construction of a particular statute, and must have reference, reasonably considered, to the peculiar objects of the legislature. It is to be observed, first, that it was prior to the statute of frauds. The law, therefore, then was, that writs of *fi. fa.* bound the debtor's property (as to all persons claiming under him), from the teste of the writ and not from its delivery to the sheriff; so that it was then possible for a party to sue out his writ of *fi. fa.*, and to omit to execute it, and so give to the bankrupt the same species of delusive credit as was provided against by the eleventh section in cases where the bankrupt was then reputed owner of another's goods. It was probably, therefore, with that view that this

this clause was introduced, providing that such writs should not bind, as against those who claimed under the bankrupt, from their teste, but only from the date of the public act done by the sheriff in seizing the goods under the writ. For this purpose, that of giving notice to the other creditors, the seizure, and not the sale, was the important period. The present case, however, depends on the question, whether the property is changed, and until sale this is not the case. The execution is not complete so as to transfer the property until that period.

But it is urged, and a great portion of the argument at the bar turned upon it, that, although it may be, that the execution creditor has no consummate right till after sale, and, although the general property in the goods remains until the sale with the debtor, yet, that the sheriff has a special property in him from the time of the seizure; and that the crown, in the event of the teste of the extent being subsequent to the seizure, must take the goods subject to that special property.

There is no doubt that a variety of authorities may be cited, establishing as clear law, that the crown must take, subject to a special property created by the act of the party. In the case of the factor, *Rex* v. *Lee* (*a*), it was held, that goods in his hands, on which he had a lien for his advances made before the *teste* of the extent, could only be taken by the crown subject to that lien. So again, in the case of goods pawned or pledged before the *teste* of the extent; *Rex* v. *Cotton* (*b*): and in the case of *Rex* v. *Humphrey* (*c*) the same law prevails. In *Ward* v. *Casberd* (*d*) an equitable mortgage created before the party creating it became a debtor to the crown on record, was in like manner held to be valid against a subsequent extent. But I can find no instance whatever,

(*a*) 6 *Price*, 369.
(*b*) *Parker*, 112.
(*c*) 1 *M'Clell.* 19.
(*d*) 6 *Price*, 411.

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nor do I believe that any such exists, where a special property, not created by contract between the crown debtor and the person setting it up as between the crown debtor and some one under whom such person claims, has been ever allowed to prevail. And I think good reasons may be assigned for the difference. In the case of land, if the subject sell it before he became a crown debtor, it is clear that the sale is good. Now, on principle, he who can make a valid sale, ought to be allowed to make any contract short of that, which shall also be valid. He may, therefore make a valid pledge. The right of the other party is consummate by the act of pledging or of sale. But the cases of a distress for rent before sale; a seizure by the messenger under a commission of bankrupt; and the case now in judgment, are very different. There the goods are all taken by an adverse proceeding from the crown debtor, and are all under the custody of the law at the time the extent is put in. The creditor's right is but in progress; and the sheriff, the commissioners of bankrupt, and the distrainer, are all officers of the law, holding the property, and having rights given to them for the purpose of protecting them in their possession, not for their own benefit, but for the purpose of disposing of it for the benefit of those who may ultimately be entitled to the proceeds of that property. The true description of the state of such property is, that it is in the custody of the law; whereas in the case of the factor, wharfinger, pawnee, or equitable mortgagee, it is in the custody of the party himself, having a beneficial interest under a valid contract. Lord C. B. *Gilbert*, speaking of lands (and the principle is the same as applied to goods, although the charge takes effect at a different period,) says, that nothing can hinder the king's charge but what amounts to a precedent alienation; and a *liberate* in pursuance of a previous judgment, amounts to an alienation of the land.

land. And yet, before the *liberate*, there is a seizure of the land by a public officer for the purpose of its being by the *liberate* alienated to the creditor. By the seizure, the land is taken into the custody of the law; by the *liberate* it is alienated to the creditor: and from the date of the latter the right of the owner is vested.

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I am aware of the various cases and authorities which exist, in which it has been determined that trover will lie by a sheriff after seizure of goods under a *fi. fa.*; and I do not dispute the proposition, that this shews that a sheriff has, for some purposes, a special property in the goods so seized. But it seems to me, that this point is not really material. The special property which the sheriff or any other public officer has, is not a property beneficial to himself; it is a property conferred on him to enable him to discharge his public duty. The goods are in *custodiâ legis*, and the special property of the sheriff is given to him that this *custodia legis* may be rendered safe. If, then; it be true, as many cases have determined, and in particular *The King* v. *Cotton* (*a*), that goods in *custodiâ legis* are in a situation in which the crown's right and that of the subject may come in conflict, I do not think that it really makes any difference whether the officer having the custody has greater or less powers to defend it conferred on him by the law. The real question seems to me to be, whether the property has wholly or in part gone from the debtor to some person claiming adversely to the crown; or, whether it is only a progress to that result. The sheriff or other public officer holds it with more or less of powers given for its protection, but really for the person ultimately entitled to receive the proceeds. If that person be a subject, having a prior writ delivered to the sheriff, the sheriff holds for him the proceeds of the

(*a*) *Parker*, 122.

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goods seized under a subsequent writ, as in *Hutchinson* v. *Johnston* (*a*); or if, as in the present case, the crown's extent come in before sale, he holds for the crown.

I have hitherto considered this as if it were *res integra*. But I shall now proceed to consider it upon authority merely. The leading case upon this subject is *Stringefellow*'s case (*b*); and the authority of that case, though doubted for a time, cannot now, I think, be disputed. It was recognized as good law by Lord *Hobart* in *Sheffield* v. *Ratcliffe* (*c*); by Lord *Rolle* in his *Abridgment*; by Lord *Hardwicke*, and the two Chief Justices, *Ryder* and *Willes*, in *Rex* v. *Cotton* (*d*); and by the Courts of Common Pleas and King's Bench, in *Uppom* v. *Summer* (*e*), and *Rorke* v. *Dayrell.* (*g*) I do not think it necessary to add the various cases in the Exchequer on this point.

It is however contended, that *Stringefellow*'s case is distinguishable, and undoubtedly it is so in its facts, from the present. The main ground of distinction is, that there remained in that case a further act to be done by the Court, viz. the award of the *liberate*. And it is said by Mr. Baron *Wood*, that the *liberate* and the *fieri facias* are equivalent to each other (*h*); but I think that proceeds on a mis-statement of the true point in the case. The right vested by the *liberate* in the creditor is to have the identical lands and the identical goods delivered to him. The creditor's right is, therefore, consummate by the *liberate*; but the *fieri facias* does not command the sheriff to seize and deliver the goods to the creditor, (in which case the *fieri facias* and seizure would be equivalent to the *liberate* after the previous seizure,) but in substance it commands him to seize and

(*a*) 1 *T. R.* 729.
(*b*) *Dyer*, 67.
(*c*) *Hob.* 339.
(*d*) *Parker*, 118.
(*e*) 2 *Blacks.* 1294.
(*g*) 4 *T. R.* 402.
(*h*) 8 *Price*, 318.

sell,

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sell, and to pay the money produced by the sale to the creditor. The act of sale, therefore, and not the act of seizure, puts the sheriff in the same situation, with respect to the creditor, as the *liberate* under an extent: for by the act of the sale the creditor has vested in him a consummate right to the produce of the sale. Now, *Stringefellow*'s case clearly decides that, until the *liberate*, the lands and goods seized, and in the hands of the sheriff, remain liable to the crown process. That case, therefore, appears to me in principle to have decided, that until the creditor obtains a consummate right, the crown's rights are not ousted; and so to govern the present case. The case of *Rex* v. *Cotton* is a much stronger authority; it seems to me to be decisive of this question. Its authority, looking at the persons by whom it was decided, and those by whom that decision was affirmed, must be admitted to be of great weight. It is not a little singular to find that, although the point now before your Lordships was there treated as the proposition, and that case as the corollary, it should now be contended, that although *The King* v. *Cotton* is good law, still the proposition from which that case was in truth only a corollary cannot be supported. The principle there laid down clearly was, that goods in *custodiâ legis* continued liable to an extent until the period arrived at which some person, other than the original debtor, had acquired a consummate right in them. And the Court clearly held that goods seized by a sheriff, but before sale, were so liable. The fanciful doctrine of a special property in an acknowledged public officer being at all material, seems never to have occurred to the great men who decided that case. The reason why the expressions as to special property are there introduced, are, as it seems to me, obvious enough: the distress is in the custody of the creditor himself, and, therefore, it might have been plausibly enough con-

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tended that he having the possession, his special property (if he had any) was to be protected for his own benefit. But the Court, looking to the substance and not the form, decide that in seizing he acted as an officer of the law; that he held as such; and that the goods were not really in his possession, but in the custody of the law; they having come to him by an especial authority given by the law, and not by the act of the party, as in the case of a pledge or a like, and the consequence being, that no property, nor even any "possession *in jure*," passed to him. This case seems to me to be *a fortiori* to the present case.

I proceed to enumerate shortly the other cases in which the law has been laid down in the same way. In *Rex* v. *Peck* (*a*) the reporter says it was taken for granted that the law was so. In the *Attorney-General* v. *Andrew* (*b*) it is not, indeed, distinctly stated whether the party had obtained possession under the subject's prior extent before the right of the crown commenced, but I think it can hardly be doubted that he had. For there the Lord C. B. *Steel* observes, "that the subject's title is prior to the crown, and is executed. 9 *Rep.* 129." Now, it appears from *Empson* v. *Bathurst* (*c*), that until the *liberate*, no fee is due to the sheriff, because the execution is not executed; and I think this explains the language of the Lord C. B. *Steel*, and makes it consistent with what he adds, that "*Stringefellow*'s case is unanswerable."

In the case of the *Attorney-General* v. *Capell* (*d*), it is stated, "that although the goods were actually in *custodiâ legis*, yet because the extent came before the property was vested by an assignment, it was held a good extent. Extents have been held good that have been made of goods actually levied by virtue of a *fieri*

(*a*) *Bunb.* 8.
(*b*) *Hardr.* 23.
(*c*) *Hutton*, 52.
(*d*) 2 *Show.* 482.

facias

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facias and in the sheriff's custody, the extent coming before a bill of sale made, so as the property was not altered." This latter passage Mr. Baron *Wood* (who omits the former part of the report) calls "a note of the reporter unwarranted by the case." To me it appears as a reason assigned by the Court for their previous judgment.

The case of *Lechmere* v. *Thoroughgood* (*a*) has been much relied on by the other side. But I cannot think it to be an authority of any weight. It is observable that the decision in that case is clearly right; and it is difficult to perceive how this point could ever have arisen. There the extent at the suit of the crown was executed before any assignment under the bankruptcy had been made. So that, according to all the authorities, the Plaintiffs had no ground of action: and the execution and the extent being set up by the same parties no question of priority *inter se* could well have arisen. Again, the writ of *fieri facias* was issued before the sheriff had notice of the bankruptcy, and as the action was trespass, the Court on that ground might well decide in his favour. The dictum attributed to Lord *Holt*, that "the king's prerogative had been taken away by the statute of frauds," cannot be supposed to have really fallen from that learned Judge. And yet this case, although thus questionable in its application to the present subject, has been one of the main grounds on which the two principal authorities on the other side, *Uppom* v. *Sumner* and *Rorke* v. *Dayrell*, have been decided.

The case of *Clerk* v. *Withers* (*b*) seems also to me to be wholly inapplicable to the present question. Indeed, like *Lechmere* v. *Thoroughgood*, it is only to be cited for certain dicta of the Court as to the execution being complete by the seizure: for the decision itself is

(*a*) *Cmb.* 123. (*b*) 2 *Ld. Raym.* 1075.

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clear enough. It was there argued that the death of the creditor after seizure under the *fi. fa.*, did not give to the debtor the right of recovering back his goods from the sheriff. And the Court held that it did not, for on the one hand there was no act to be done in Court necessary to give the sheriff authority to act, his authority being complete by the *fi. fa.*, and therefore the death was immaterial to that purpose. But, secondly, the levy under the writ was pleadable in bar to another action for the same debt, so that the debtor sustained no injury by the execution proceeding. But indeed this case would prove too much; for it is also true that after the award of the *fi. fa.* and before seizure, the same result would follow: *Thoroughgood*'s case (*a*); cited by *Gould* J. in giving his judgment. Now, it is not pretended that an award of *fi. fa.* would bar the crown before seizure. The principles, therefore, of that decision are wholly inapplicable to this question. There are some *dicta* in that case certainly which may be relied on; but I think that if they are read, as all such *dicta* ought to be, with reference to the case then before the Court, they also will be found not applicable to the present subject. To some purposes, no doubt, the execution may be called complete by the seizure. It undoubtedly was so at that time, as regarded priority between an execution-creditor and the assignees of a bankrupt. It was not so in all cases however, even between subject and subject, as appears from *Hutchinson* v. *Johnstone*; and I think it is not so *a multo fortiori* in a case between the subject and the crown, which has a prerogative peculiar to itself in interposing in *medio*.

Curson's case (*b*) is still less applicable. It depends on a totally different principle. There, *Curson* acknowledged a statute to *Starkey*, and afterwards another to *P. S.*, who assigned to the crown. The liability, there-

(*a*) *Noy*, 73. (*b*) 3 *Leon.* 239.

fore,

fore, on which the crown proceeded was created subsequently to that to *Starkey*. After this, *Starkey* obtained possession under his execution; and it was held that the debt to the crown did not bind the lands from its assignment, so as to avoid the subsequent but consummate execution. It may be observed, also, that this case is within the statute *Hen.* 8.; for the judgment was prior to the king's debt, and the execution was consummate before the king's extent. Lord C. B. *Gilbert* (p. 94.) gives this reason for it; for he says, "the creditor, *Starkey*, did not, by the liberate, take the land *sub onere* of the king's debt, because his lien was antecedent to it; and it were repugnant to construe him to take the land *sub onere* of the king's debt, when he took it in satisfaction of a debt precedent." So again, on the same principle, it has been held that if *A.* infeoffs *B.* of his lands, after a judgment confessed by him to *C.*, the crown, as assignee of *C.*, cannot take more than *C.* could; *viz.*, a moiety of the land: although, no doubt, if the judgment had been confessed to the crown originally, the crown could have taken the whole. In fact, it depends on the principle, that where the law allows a party to contract, it will not permit that contract, by any matter arising *ex post facto*, to be made of no value; a principle to which I have before referred, in distinguishing goods on which there is a lien by contract from goods in the custody of the law.

The case of *Uppom* v. *Sumner*, which is the leading authority on the other side, would, I think, be entitled to much greater weight, if it had not proceeded a good deal on the case of *Lechmere* v. *Thoroughgood*. Even taking the different reports of that case in the way suggested by Mr. J. *Gould*, no great advantage as to clearness can be derived; and I cannot help thinking that the better course would have been to have placed no

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no great reliance on a case in which a part was to be picked up from one reporter, and a part from another, in order to make something like a connected account, instead of attributing the confusion to the most obvious and natural cause, *viz.*, the inaccuracy of the reporter.

The same observation applies to the case of *Rorke* v. *Dayrell*: the Court there also relied a good deal on *Lechmere* v. *Thoroughgood*.

I shall not at present refer to the main ground on which both these cases proceed; *viz.*, the statute of *Hen.* 8., because I propose to consider that question separately. Subsequently to both these, the cases of *Rex* v. *Wells and Allnutt* (*a*) and *Rex* v. *Sloper and Allen* (*b*) arose in the Court of Exchequer, in which the present question was decided, after reviewing all the authorities, in the affirmative. Upon the whole, I have arrived at the conclusion that the preponderance of authority also, as well as the principle on which such authorities ought to proceed, establishes the proposition, that where an extent of the crown comes after seizure and before sale, it ought to be preferred, unless, by the statute 33 *Hen.* 8. *s.* 74. there has been an alteration made in the ancient prerogative by which the priority has been taken away. I, therefore, come, in the last place, to the consideration of the true construction of that statute. There can be no doubt, even without authorities on this subject, that the statute must be construed as abridging the prerogative. But authorities are not wanting. In *Cecil*'s case (*c*) the court so expressly resolve: and other passages might be easily cited, if necessary, to the same effect. The real question, however, is not, whether the prerogative is abridged, but to what extent it is abridged by the clause. If taken literally, the clause would, as has been

(*a*) 16 *East*, 278. (*b*) 6 *Price*, 114. (*c*) 9 *Rep.* 92.

well

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well observed, place the crown in a worse situation than a subject. This could hardly be the real intention of the legislature in a reign not remarkable for such concessions. And this will appear from a reference to the state of the law as it existed at the time the statute was passed. There are, however, two grounds, either of which, as it seems to me, is sufficient to show that this clause of the statute is not applicable to the present question: first, the words are confined to suits commenced or taken, or process awarded, for the recovery of the king's debts. Now, I apprehend, that an immediate extent does not fall within either of these descriptions. They are confined to suits and process for the recovery of the king's debts, in the ordinary course, from his solvent debtor. An immediate extent is founded on an affidavit of the insolvency of the debtor, and issues, not for the purpose of seizing his property to the amount of the debt, but all his lands and goods into the hands of the crown, there to remain till the crown debt is satisfied. It is, therefore, rather like a forfeiture incurred by him in consequence of his failure, than a suit or process for the recovery of the debt. Again, it may, according to the admitted course of the Exchequer, issue in the midst of the proceedings, on an ordinary suit, and even where the debt is disputed. *Rex* v. *Pearson*. (*a*) In an ordinary extent, which is a prerogative execution, the debt, of course, is conclusively settled by the judgment; but in an immediate extent, the debt is not settled, but may be disputed by the debtor on the return of the writ. In fact, it is then that the suit respecting the king's debt, properly speaking, begins. These various differences seem to me to shew that this proceeding could not have been contemplated by the legislature when they speak, in this

(*a*) 3 *Price*, 288.

clause,

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clause, of suits and process for the recovery of the king's debts. But, secondly, I think, that even if an immediate extent were a suit or process for the recovery of the king's debts, still the clause would not be applicable to this case. This is very clearly stated by Lord *Coke*. "As to the third protection, *cum clausula volumus*, the king, by his prerogative, regularly is to be preferred in payment of his duty or debt by his debtor before any subject, although the king's debt or duty be the later; and the reason hereof is, for that the *thesaurus regis est firmamentum belli et fundamentum pacis*; and therefore the law gave the king remedy, by writ of protection, to protect his debtor that he should not be sued or attached until he paid the king's debt. But hereof grew some inconvenience: for to delay other men of their suits, the king's debts were the more slowly paid. And for remedie thereof, it is enacted by the statute 25 *Edw.* 3. that the other creditors may have their actions against the king's debtor, and proceed to judgment, but not to execution, unless he will take upon him to pay the king's debt, and then he shall have execution against the king's debtor for both the two debts." 1 *Inst.* 131. *b.*

It appears, therefore, that when the statute of 33 *Hen.* 8. was passed, the creditors of a crown debtor could not proceed further than judgment, but were liable to be restrained altogether from taking out execution upon such judgment. By that statute new powers were given to the crown, and new restraints, on the other hand, imposed on the prerogative. Certain debts to the king, not of record, which before did not bind the subject till recorded, were placed on the footing of a statute staple, and so bound from the time of contracting them. It is so laid down by Lord C. B. *Gilbert*, page 88., and is in conformity with the general law which I have before stated from Lord *Hobart*'s reports.

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reports. For, in order to make the king's debts not of record bind from the time of their contracting, a statute would clearly be required. Lord Chief Baron *Gilbert* in another part of his treatise says, "This branch of the statute had its origin in the practice introduced by 3 *H.* 7. *c.* 3. of taking recognizances to the king before justices of the peace, instead of the ancient mode in use, before conservators of the peace, sheriffs, and constables, the two latter of whom when they bailed took the obligation in their own names and not to the king. Now these recognizances to the king, says he, "being only personal securities, it became a doubt when they began to bind the lands of the subject, and formerly they held that such recognizances did not bind the land till they were returned of record." And the fifty-sixth section, which, if construed literally, would appear wholly useless as far as relates to the Court of Exchequer, may, I apprehend, have a sensible construction given to it by referring to the second part of the fifty-fourth section, by which the king was authorized to proceed with suits depending in the name of a common person to his grace's use, and which, therefore, required to be placed on the same footing as to execution with suits originally brought by the crown. I think, therefore, that so far as relates to the king's debts, all that was in effect done by the various sections of the 33 *H.* 8. *c.* 39. was to give a priority to the particular debts not being of record, as if they had been contracted originally by a recognizance in the nature of a statute staple, which binds from the time of the contracting. Now reasoning *à priori*, it would be probable that such a new power would have some counter balance in order to place the subject as nearly as possible in the same situation as he was by the 25 *Edw.* 3. By that act the subject's writ of execution might be stayed from the time the king's debt on record was contracted. A date easily

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to be ascertained. But when the king's debt not of record was to bind by this new power from the time of its being contracted, it might become very difficult for a third person to ascertain that period. And "it might well be considered unjust to superadd such a hardship in the case of a person who levied under an execution sued out indeed after the king's debt was contracted, but after a contract of which, it not being of record, he could know nothing. It would, therefore, be not unnatural to suppose that some restriction would be imposed rendering it necessary for the crown, seeking to avail itself of the new power, to take some public steps before the judgment obtained by the subject should thus lose its efficiency. Now, I apprehend that this was in fact done by the seventy-fourth section, which I construe as providing, that, if before the king's debt is put in suit the subject has obtained a judgment (on which but for the new law he might have sued out a writ of execution in due course), he shall still have the writ of execution, and proceed on it, notwithstanding the king's debt was in existence, and in defiance of any writ of protection from the crown. In this case, therefore, the crown is prevented from staying the proceedings by any writ of protection, and the creditor, if by using due diligence he can cause the sheriff to seize the goods and sell them before the extent comes on the part of the crown, shall be entitled to reap the fruits of his diligence. The words are, "The king shall have first execution," which I think means, shall first have a writ of execution from "the Court." In like manner, in the statute 25 *Ed.* 3. *c.* 19. the words are, that the creditor having settled for the king's debt, "shall have execution" agninst the defendant, which clearly there means "shall have a writ of execution."

Upon the words, therefore, as well as on the intention of 33 *H.* 8. *c.* 39. *s.* 74., as collected from the act itself, compared

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compared with the statutes which preceded it, I have come on both these grounds to the conclusion that, according to the true construction of the seventy-fourth section, it has no reference whatever to the question now before your Lordships. I am aware that this is contrary to the construction put on the statute in the cases of *Rorke* v. *Dayrell* and *Uppom* v. *Sumner*. But after fully considering those authorities, and the reasons assigned there, which do not satisfy my judgment, and finding them in opposition, as it seems to me, to the cases of *Rex* v. *Cotton*, *Attorney-General* v. *Capell*, *Rex* v. *Peck*, *Rex* v. *Wells and Allnutt*, *Rex* v. *Sloper and Allen*, and, I would also say, to the *Attorney-General* v. *Andrew*, and the uniform course of the Court of Exchequer, I think that those cases are not well decided; and that, both on the ground that they are contrary to the true construction of the act, as deduced from a proper reading of it, if the question were *res integra*; and also on the ground that they are opposed to cases of greater weight and authority, to which I have already referred.

I have to apologise to your Lordships for the length at which I have considered this question; but I trust that the importance of it, and the great weight due to the authorities on both sides, will be a sufficient reason for my having so done.

On the second question I shall not detain your Lordships, as I believe there is no difference of opinion upon it. I think that it should be answered in the negative.

TAUNTON J. The first question propounded by your Lordships to the Judges is one of very considerable difficulty, arising, in my humble judgment, not so much from the nature of the subject when properly understood, as from the conflicting decisions of the courts in *Westminster Hall*. This question may be considered in two points

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points of view, first, whether by the seizure on the part of the sheriff, of the goods under the writ of *fieri facias*, the property is so altered as to leave nothing in the debtor upon which the writ of extent can attach: and, secondly, whether the statute 33 *Hen.* 8. *c.* 39. *s.* 74. applies to the present case, which latter enquiry involves a consideration of the law as to the prerogative with respect to the king's debts before and at the time of passing that statute.

With respect to the first point, it is so clearly laid down in all the text books as a general proposition, that the property of goods is not altered, but continues in the Defendant until execution executed, that it cannot be necessary to say much on that point. But then a question arises, when is execution executed, that is, completed? It would seem, from the language of the writ of *fieri facias*, that the sheriff has not completed the whole of his duty under the writ until he has converted the goods and chattels seized into money; for the writ enjoins him, that of the goods and chattels of the Defendant he cause to be *made* so much money; and he is further enjoined, that he have that *money* before the king at *Westminster* on the return day, to be rendered to the Plaintiff: so that the selling or making of the goods into money appears to be a most essential part of the sheriff's duty.

But it has been contended in many of the cases on this subject, and more particularly by the late Mr. Baron *Wood*, in his elaborate judgment in the case of *The King* v. *Giles* (*a*), that the execution is executed by the seizure; and, certainly, if that were the case, there would be an end of the question; because it is abundantly clear that, after execution executed, an extent from the crown comes too late: *The Attorney-General* v. *Fort* (*b*). In such case the property is altered, and the

(*a*) 8 *Price*, 314. (*b*) 8 *Price*, 364. in note.

crown

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crown cannot, on process against *A.*, seize the goods of *B.*

Considering the authority by which this proposition of the seizure alone changing the property has been maintained, it becomes necessary to investigate the law upon the subject, and examine the grounds upon which it has been supported. If the property be altered by the bare seizure, to whom does it pass? They say to to the sheriff. But this cannot be, for the goods would not be forfeited by his outlawry, or his conviction for felony, nor would they pass under a grant of "all his goods;" and if, after seizure, the Defendant pays the debt to the sheriff, he is entitled to have his goods again without any grant from the sheriff, or, if a leasehold, without re-assignment. So also, I apprehend, if goods in execution are burnt, or otherwise injured without default of the sheriff, it is the loss of the Defendant. The sheriff under the writ has a mere power to sell, without any interest vested in him, except that which every *bailee*, such as a carrier, wharfinger, &c. who is answerable over, has for his own protection. This interest, if so it may be called, is called a special property, as contradistinguished from a general property; and, in respect of this, we know he may bring trover for the goods seized against a stranger. But it is not a beneficial interest. In addition to these illustrations there is the authority of Lord *Hardwicke*, who lays it down in 2 *Eq. Ca. Abr.* 381. that neither before the statute of frauds nor since is the property of the goods altered by mere seizure, but continues in the Defendant until the execution executed. The cases cited by Mr. Baron *Wood* in support of his opinion, that the property is altered by the sheriff's seizure, and before actual sale, by no means bear him out. The first case he cites with respect to goods and chattels, is *Lechmere* v. *Thoroughgood.* (*a*) That was an action of

(*a*) *Comberb.* 123. 3 *Mod.* 236.

trespass, not trover, brought against the sheriff. The extent there, was after the seizure, and before any sale or *venditioni exponas*, and it appears, certainly, that a question was made, whether the extent did not come too late, and the judges are reported to have intimated an opinion that it did. But the case was not decided upon that ground. Judgment was ultimately given for the Defendants, (and not for the Plaintiff, who impeached the validity of the extent,) upon the ground that they could not be made trespassers by relation. The opinions, therefore, thrown out, were mere *obiter dicta*, and the reports themselves are very loose and unsatisfactory. In one of them, *Comberbach*, Lord *Holt* is indeed reported to have said, "the property of the goods is vested by the delivery of the *fieri facias*;" but this is directly contrary to the opinion of Lord *Hardwicke* in 2 *Eq. Cas. Abr.*, and to the two cases of *Burdon* v. *Kennedy* (*a*), and *Phillips* v. *Thompson* (*b*), in which latter it was decided, that by the delivery of the writ, the goods were only so bound that the defendant could not dispose of them afterwards, and that the delivery of the writ to the sheriff is no execution thereof. And this *dictum* of Lord *Holt*, Lord *Mansfield*, in *Cooper* v. *Chitty* (*c*), suspected was a mistake of the reporter.

The next case relied on by Mr. Baron *Wood* is *Clerk* v. *Withers*. (*d*) In that case the principal question was respecting the operation of the stat. 17 *Car.* 2. *c.* 8. upon a judgment by default obtained by an administrator; whether, as that statute applies in terms only to judgment after verdict, there could be any personal representative of the intestate who could, by process, compel the sheriff to sell. It was incidentally contended there, by counsel, that a seizure by the sheriff

(*a*) 3 *Atk.* 738.
(*b*) 3 *Lev.* 191.
(*c*) 1 *Burr.* 20.
(*d*) 6 *Mod.* 290.

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was a satisfaction of the debt, and, therefore, that the plaintiff, who had brought a *scire facias* to have restitution, should not have it. But the utmost length to which Lord *Holt* carried this was, that the seizure to the value of the debt discharges the defendant, unless the execution be afterwards avoided, and that the seizure, so long as it continues, is a sufficient bar. But the point really determined was, that an execution being an entire thing when once begun, shall, as between the parties, be proceeded with, notwithstanding a change of sheriff, or the death of the plaintiff, nothing having occurred to avoid the seizure, or to intercept the authority of the sheriff before sale, the sale, under such circumstances, being considered but a formal part of the execution. There was no decision, that, as against one having a paramount claim, the property, by the seizure, was irrevocably changed; but the whole is consistent with the hypothesis, that the goods, in such a case, are in the custody of the law.

With respect to the argument drawn from the statute 21 *Jac.* 1. *c.* 19., — which provides, that where no execution or extent has been served and executed, creditors by judgment, statute, &c. or other security, shall not be relieved upon any such judgment, &c. for more than a rateable part of their just and true debt with the bankrupt's other creditors, without respect to any greater sum contained in such judgment, &c. or other security, — and upon which it has been determined that when a creditor has obtained judgment and sued out execution, and a seizure has been made under it, if before sale an act of bankruptcy intervenes, the judgment creditor shall not be obliged to come in under the commission, but the sheriff may proceed to sell the goods; from which determinations Mr. Baron *Wood* draws the conclusion, that they must have proceeded on the ground, that as soon as goods have been seized under a *fieri facias*, *that* seizure is considered in law as being an execution executed;

cuted; the answer is, that these determinations only prove, that as between subjects, an execution, once begun by seizure, shall proceed, notwithstanding a subsequent act of bankruptcy, and commission issued; and in the case of *Audley* v. *Halsey* (*a*), which I believe was the first decision to this effect, wherein the circumstances were precisely the same with those in *Stringefellow*'s case (*b*), — the main difference being, that in the one the bankrupt commissioners claimed against the extent upon the statute staple, and in the other, the crown,— the Court expressly distinguished it from the case in *Dyer*, by saying, " for there, although the goods were extended, yet they were not delivered to the conuzee, and the writ was not returned, and the writ of privilege was for debt due to the king, wherein the king hath his prerogative by the common law." In addition, I may observe, that the distinction taken in the recent cases of *Wymer* v. *Kemble* (*c*), *Notley* v. *Buck* (*d*), and *Morland* v. *Pellatt* (*e*), which were in exposition of the stat. 6 *G.* 4. *c.* 16. *s.* 108., proceeded principally upon this very difference between a mere naked seizure before bankruptcy, and a seizure consummated by sale, or the payment of the money directed to be levied. In *Wymer* v. *Kemble* the goods of the debtor had been seized under a *fieri facias*, and delivered to the creditor under a bill of sale by the sheriff; then a bankruptcy followed, and it was held that the Plaintiff had ceased to be a creditor, the origienal debt having been extinguished by the sale. The like decision was come to in *Morland* v. *Pellatt*, where, though there had been no sale of the goods, the balance of the money directed to be levied had been paid over to the sheriff before the act of bankruptcy. But in *Notley* v. *Buck*, where the sheriff had made a seizure before the act of bankruptcy, but the goods remained in

(*a*) *Cro. Car.* 148.
(*b*) *Dyer*, 67 *b.*
(*c*) 6 *B.* & *C.* 479.
(*d*) 8 *B.* & *C.* 160.
(*e*) 8 *B.* & *C.* 722.

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his hands unsold at the time of it, it was held that the sheriff could not pay over to the creditor the proceeds of the execution received upon a sale *after* the bankruptcy.

But although the position that the property is not devested out of the debtor by mere seizure under a *fieri facias*, was partly admitted by the counsel of the Plaintiff in error in this case, yet it was most strongly pressed by him in his argument that by the seizure the judgment-creditor here had a lien on the goods or a special property therein, and that the crown under an extent can only take subject to that lien or special property. And this right of the judgment-creditor, he observed, had not been adverted to in any of the cases. With respect to the property, many other cases might be added; but enough probably has been said, and I will add only the authority of Mr. Justice *Bayley*. In *Morland* v. *Pellatt* the learned Judge says, "After seizure, and before sale, the sheriff has a special property in the goods; but the debtor has the general property; up to that time, therefore, the debt is not extinguished, and the judgment-creditor has a security for his debt." This special property is in the sheriff, not as trustee for the judgment creditor, but for the purpose of his own protection. Neither had the judgment creditor, in this instance, any lien on the goods. Let us see what a lien is. In *Hammonds* v. *Barclay* (*a*), Mr. J. *Grose* says, "a lien is a right in one man, to retain that which is in his possession belonging to another, till certain demands of him, the person in possession, are satisfied." The Master of the Rolls, in *Gladstone* v. *Birley* (*b*), lays it down, "the question always is, whether there be a right to retain the goods till a given demand shall be satisfied." In *Lickbarrow* v. *Mason* (*c*), Mr. J. *Buller* observes, "liens at law exist only in cases where the party entitled to them has the

(*a*) 2 *East*, 227.
(*b*) 2 *Meriv.* 404.
(*c*) 6 *East*, 25. note.

possession of the goods; and, if he once parts with the possession after the lien attaches, the lien is gone." In *Heywood* v. *Waring* (*a*), Lord *Ellenborough* says, "without possession there can be no lien. A lien is a right to hold, and how can that be held which was never possessed." In *Hallett* v. *Bousfield* (*b*), Lord *Eldon* asks, "how can the doctrine of lien, that is, the right of a party having property in his possession, to retain it until his demand is satisfied, be applied to the interest of a freighter who has no possession, the whole being in the possession of the owner." (And many other dicta to the same effect are collected by Mr. *Montagu*, in his *Summary of the Law of Lien*, Introductory Chap. p. 1. &c.) So here, I ask, how can the doctrine of lien to retain these goods be applied to this judgment creditor who had no possession, the goods being in the possession of the sheriff. The sheriff seizes, not as the agent or servant of the party, but as a minister of justice and an officer of the Court; and, therefore, his possession is not the possession of the creditor, but the custody of the law. But, if there was no lien, the cases of *The King* v. *Humphrey* (*c*), *The King* v. *Lee* (*d*), and *Casberd* v. *The Attorney-General* (*e*), which were cases of a wharfinger's and a factor's lien, and an equitable mortgage by deposit of the title deeds, are inapplicable, the creditor there having had actual possession of the articles in respect of which he claimed. But when goods are in what is called the custody of the law, the property is, as it were, in abeyance, and must ultimately belong to the party to whom, under all the circumstances, the law adjudges it.

But it was said that the judgment creditor, by force of the seizure, had at least a security. This has cer-

(*a*) 4 *Camph.* 291.
(*b*) 18 *Ves.* 188.
(*c*) 1 *M'Clell. & Y.* 173.
(*d*) 6 *Price*, 369.
(*e*) 6 *Price*, 411.

tainly,

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tainly been so decided with reference to the 6 *G.* 4. *c.* 16. *s.* 108. But I do not see what it proves. The security may be vested and certain, or it may be contingent and defeasible. It does not necessarily import present property, nor even beneficial interest. If tenant for life without impeachment of waste, or tenant in tail, sell trees standing and growing on the land, which he may lawfully do, the vendee, in common language, might be said to have a security for the money which he has advanced; but if the vendor should die before the trees are severed from the soil, the right of the remainder-man or issue in tail steps in and defeats that of the vendee. So here, although the judgment creditor had a security, yet still it was a possible case, I say no more at present, that a *jus tertii* might interpose and destroy it.

This brings me to the consideration of the second branch of the question, namely, whether the extent in this case at the suit of the crown constituted such a *jus tertii*. It is perfectly clear, that at common law the king had very peculiar prerogatives, much beyond the common right of a subject for the recovery of his debts. Of these, (not to mention others which are not to the present purpose,) one was, that where one was indebted to the king, and likewise to other persons, the king's debt was to be preferred in payment, that is, the king was to be paid before any other creditor of the party, and, consequently, to be preferred in an execution. *Mad. Exch.* 183. *c.* 23. *s.* 7. The general rule is, and this has been acknowledged in all the cases, that when the right of the king and that of a subject concur, that of the king shall prevail. See the instances put in *The Attorney-General* v. *Andrew*. (*a*) But in ancient times the law of prerogative went farther than this, and provided the most effectual means of

(*a*) *Hardr.* 23. *Plowden*, 258, 259. 264.

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security, that the king's title should always be the first. It prohibited the creditors of a king's debtor even from taking out execution until all the king's debts were satisfied, although the king's debts were the later in point of time; and if the king's debtor, notwithstanding, was sued or attached, the king had a remedy by writ of protection to protect his debtor: *Co. Litt.* 131. *b.* *Fitz. N. B.* 65, 66. tit. *Protection.* *The King* v. *Cotton.* (*a*) A king's debtor could not make a will to dispose of his chattels to the king's prejudice, nor could his executor have administration, without permission from the king or justices, or barons of the exchequer, upon giving security to answer the king's debts. See numerous precedents in *Maddox's Exchq. c.* 23. These prerogatives have, at different times, been controlled and regulated by statutes; but these very statutes testify their existence. Thus, in the statutes of Magna Charta, 9 *Hen.* 3. *c.* 18., it is enacted, that if any holding of the king a lay fee do die, and the sheriff shew the king's letters patent of his summons for debt, which the dead man did owe to the king, it should be lawful to the sheriff to attach and enrol all the goods and chattels of the deceased being found in the lay fee, to the value of the debt, so that nothing thereof should be removed until the debt be paid off, and the residue should remain to the executors to perform the testament of the deceased. Again, the stat. 25 *Ed.* 3. *c.* 19., after reciting, that forasmuch as the king had before that time made protections to divers people which were bounden to him in some manner of debt, that they should not be impleaded of the debts which they owed to others, till they had made gree to our Lord the King of that which to him was due by them by reason of his prerogative; and so, during such protections, no man hath used nor durst implead such

(*a*) *Parker*, 123.

debtors,

debtors; enacts, that, notwithstanding such protections, the parties which have actions against their debtors shall be answered in the king's court by their debtors; and if judgment be thereupon given for the plaintiff or demandant, the execution of the same judgment shall be put in suspense till gree be made to the king of his debt: and if the creditors will undertake for the king's debt, they shall be thereunto received, and shall have execution against the debtors of the debt due and adjudged to them, and also shall recover against them as much as they shall pay to the king for them. After the passing, therefore, of this statute, which considerably abridged the ancient prerogative, although a subject might pursue his debtor to judgment, yet he could not sue out execution until the king's debts were paid or secured, the king being entitled to the first execution. This execution, it is material to recollect, at the common law, was against the body, the land, and the goods of the accountant or the king's debtor. Sir *William Harbert's* case. (*a*) The words of Lord *Coke* on this point are, "It was resolved that, at the common law, the body, the land, and the goods of the accountant or the king's debtor were liable to the king's execution, for *Thesaurus Regis est pacis vinculum et bellorum nervi*, and, therefore, the law gave the king full remedy for it: and therewith agrees 5 *Eliz. Dyer* 224., and *Plow. Com.* 321.; Sir *William Cavendish's* case, who was treasurer of the chamber; 24 *E.* 3., *Watten De Chirton's* case; and infinite precedents in the Exchequer, to prove, that for the king's debt, the body and the land of the debtor shall be liable by the common law before the statute of 33 *H.* 8. *c.* 39." The statute did *not* give to the crown this triple remedy, and whether it could be pursued as now by one single process, or must have been separately worked out by different writs, is a matter of no moment.

(*a*) 3 *Rep.* 12 *b.*

Thus

Thus stood the law until the sta
passed. And upon this short sta
me no doubt, that if no alteration
spect was made by that statute, th
instance, is entitled to preferen
although it did not reach the sheri
was partly executed by seizure; f
to hold that when it was unlawful
before the king's debt was paid, th
disobedience of the law in suing ou
gain an advantage over the king.
33 *Hen.* 8. *c.* 39. altered the law i
stat. sect. 74. enacts, "that if any
or taken, or any process be herea
king, for the recovery of any of th
then the same suit and process sha
the suit of any person or person
sovereign lord, his heirs and succ
first execution against any defend
and for his said debts, before any
sons, so always that the king's sai
commenced, or process awarded fo
suit of our said sovereign lord th
successors, before judgment given
person or persons." It has been ve
by Lord Chief Baron *Macdonald*, i
case of *The King* v. *Wells and Allnut*
to the construction put upon this
Uppom v. *Summer* and *Rorke* v. *Day*
effect of postponing the king's execut
happen to be prior, both in *teste* a
subject's execution on his prior jud
be putting the crown, as to its exec
footing than a subject, inasmuch as

(*a*) 16 *East.* 280, 281

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delivery of the writ of execu-
e question of preference, with-
r of judgment. Such a result
been intended, and this goes
he construction animadverted

But I am of opinion, upon
section of the statute has been
st branch declares, generally,
rocess shall be preferred before
r persons. This seems to be
anch, which confirms the right
e this statute of having the first
ce where there are two concur-
e suit of the king; but the first
sole and exclusive execution
or his debt, before any other
ie condition or proviso, "so
said suit be taken and com-
led before judgment given for
Now, I take this seventy-fourth
t to the nineteenth chap. of the
ment mentioned herein to mean
r favour of the latter statute.
e this; Where the subject has
ie king is entitled, as of course
process, to the first execution.
ntained a judgment before any
crown, the execution thereof
e stat. 25 *Edw.* 3. *c.* 19., be put
made to the king of his debt;
liberty to follow it up by exe-
g's debt be not paid; and if he
ompletely executed before the
t, he will be safe; for the king
r the first execution where the
ommenced, or process awarded
before

before judgment given for the other person. By
construction the greater difficulties, in my humble ju
ment, will be overcome, though perhaps some may
main; and this will account for the disuse of protecti
afterwards, which would be unavailing when the k
had no longer a right in all cases to the first executi

So much by way of argument from the account
have in our books of our ancient prerogative, and fi
the statutes.

The cases that have been decided upon this quest
have been so often cited that it is unnecessary to
through them all; I will only observe, that the wei
of authority appears to me to preponderate very co
derably in favour of the right of the crown. The cou
of decision in the Court of Exchequer has been
form, with the exception of the *Attorney-Genera*
Andrew (*a*), and Mr. Baron *Wood*'s opinion in *The K*
v. *Giles*, on that side; and considering that this is
king's great court of revenue, in which the Judges
more particularly conversant with these matters,
consistency of judgment ought to carry great wei
with it. In the *Attorney-General* v. *Andrew* the reas
assigned by the Judges are extremely short, and in tr
consist only of two; the one that the stat. 33 *Hen*
abridges the prerogative, and controuls the comm
law, and that the words in the seventy-fourth sec
make a condition precedent, and imply a negative;
second, that there the subject's title was prior to
king's, and was executed. I have already explai
why, in my opinion, the interpretation that has b
made of this statute is an erroneous one, and why
statute does not affect the present case. With resp
to the holding that the subject's title was executed
liberates had issued upon the *elegits*, which does

(*a*) *Hardr.* 23.

app

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he case, there is no doubt but
f nothing more had been done
ds upon the *elegits*, I take the
the subject's title was not exe-
ngefellow's case (*a*) is my autho-
ngefellow had sued out a writ of
ecution of a statute staple. The
the defendant's lands, and seized
nds, but did not make livery,
of the king's prerogative issued
chequer, reciting the prerogative
have to be first served and paid
nmanded the sheriff to levy the
the debtor; and if he had not
nd his land. This writ was de-
ter the day of the return of the
ie first writ was returned. On
) the king's writ that the debtor
o be extended besides the goods
tenements above extended, and
er execution of that writ he had
olden in the Exchequer for law
be amerced if he would not
nely, return the extent into the
e of the king's debt; and Justices
e of the same opinion, because
ods and land was not in *Stringe-*
delivered to him by the writ of
always been acknowledged for
ugh a *query* is subjoined by the
goods on being seized into the
ivered to the party, were in the
ion of the law, and privileged
is, yet this doubt proceeds from

) *Dyer*, 67 *b*.

not

not attending to the distinction between the king's
and that of a common person. In the case of a sub
goods distrained or seized in execution cannot be
taken, for that reason; but it is otherwise in the ca
the king. *The Attorney-General* v. *Capel.* (*a*) See
the note by *Manwood* Chief Baron, in margin, *Dy.*

The cases of *Uppom* v. *Sumner* and *Rorke* v. *Da*
appear to me to have been determined on wrong
ciples. Little research appears to have been mad
either, into the nature and extent of the royal p
gative at common law. In the first, the judgment
ceeded principally on the stat. 33 *H.* 7. *c.* 8.; and i
latter, on the mistaken assumption that the property
changed by the delivery of the writ to the sheriff.
all my respect for the learned Judges by whom
cases were decided, and no one can have great
cannot assent to them. And I do this with the
freedom, because on no less than three solemn occa
the Court of Exchequer has subsequently testifi
similar dissent.

The case of *Thurston* v. *Mills* (*b*) is no authority
way; because although the Court intimated they
formed an opinion on the point, it was not divu
With these exceptions, the determinations of the c
will be found, from the earliest times, to have be
favour of this prerogative. I therefore humbly g
as my opinion, that the first question propounde
your Lordships should be answered in the affirmati

With respect to the second question submitted t
judges, — Whether it makes any difference whethe
writ of extent be in chief or in aid — I am of op
that, in this respect, there is no difference betwee
immediate extent and an extent in aid. It appea
have been the practice, in very ancient times, that

(*a*) 2 *Show.* 481. (*b*) 16 *East*, 254.

isfy the king's debt out
would betake himself to
indebted to the king's
such third person what
n order to get payment
own. *Mad. Exch.* c. 23.
e king's debtors or ac-
writs of aid, whereby
persons as were indebted
em to answer the debts
ny precedents of both
by *Madox* in the notes,
is in the fifth year of
whereof it is stated that
g 100*l.* for the arerage
, except *Winchester*, and
f *Engelran de Mustroil*;
acknowledged before the
. he owed so much to
eupon *William* Earl of
or to the king) with the
s are of the reign of
some of them the man-
a former sheriff, or to
distraining persons in-
the like; and therefore
aid, the process being
ted to the crown; but in
he executors of *Herbert*
nd the executors of the
ndate to the barons is,
'those particular persons,
satisfied the debts which
cording to the law and
is process, though now
degree, is, in principle,
the

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the same as that called peculiarly an extent in aid only difference being, that in the one case the cro the real as well as the nominal Plaintiff; in the the process is sued out for the recovery of the deb to the king's debtor, and for his benefit.

It is clear, therefore, from these authentic re that the practice of charging the debtors of a p indebted to the king, for the king's debt, goes be far as the period of legal memory; and the proce been gradually moulded into its present shape limited to its present extent by statutes, and b rules and decisions of the Court of Exchequer.

I am of opinion, therefore, that it makes no diff whether the writ of extent was in chief or in aid.

VAUGHAN B. After much consideration devo the question which your Lordships have been p to propound to the Judges, I am of opinion th writ of extent issued by the crown under the ci stances stated, ought of right to supersede the su execution.

During the progress of this inquiry my min been agitated by doubts suggested by a review conflicting judgments which have been pronoun the superior courts of *Westminster Hall* upon thi controverted question, involving a claim to exerc important prerogative of the crown on the one and a valuable civil right of the subject on the oth

The arguments in favour of the Plaintiff in erro be resolved into the following propositions: — That no prerogative right existed in the crown common law to issue an extent whereby the good chattels, and lands of the king's debtor might tended, and his body seized to enforce the paym his debt.

Secondly, that, admitting the existence of such ro

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he common law, it was restricted statute 33 *Hen.* 8. *c.* 39., so as to the case *sub judice*.

pendent of all prerogative right, of the sheriff under a *fieri facias*, ent creditor, the property in the thereby *altered*, no longer con- the debtor, and consequently no process of the crown.

sheriff acquired, by the seizure, in the goods as to deprive the o be derived from this process of

depends upon the true con- *en.* 8. *c.* 39. *s.* 74.: but, in the in- atute, the important preliminary ; *viz.*, whether before, and inde- ative enactments, the crown was mmon law, to extend the lands, s well as the goods and chattels satisfaction of the debt.

his *Treatise upon the Law and* tates, (but, as I conceive, erro- n derived its power of issuing an ons of this statute. In page 108 s statute gave to the crown a new ll its debts; a species too of exe- at statute was the subject's exe- t's only;" and in page 110. he ject's process by extent being im- e crown will of course have the of that process as the subject."

treatise seems to have been be- by what I would rather call an ccurate expression of Lord *Coke* the eighth Cap. *Magna Charta*,

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2 *Inst.* 19. which contains the followi
" After the statute 33 *Hen.* 8. *c.* 39. wa
ing of the king's debts, the usual proce
at this day is, *Quod diligenter per sa*
From the words *after the statute* Mr.
the king was not empowered by virtue o
at the common law, to issue any writ
force the payment of his debts *before* tl
authority being created and conferred
by the provisions of that act. Lord C
bert understands this expression of Si
after the statute, &c. in the same
he suggests a doubt respecting its
page 127. of his *Treatise on the Cou*
after transcribing a process known by
long writ, he observes, " My Lord C
was made *since the statute*, but of t
doubt, because it seems so contrived tl
should be found whether the debtor ha
chattels, and if upon inquisition there
then to extend the lands and to take
debtor. So that it seems this writ
used before the stat. of *Hen.* 8. withou
Magna Charta, for if it were found th
no goods, they might seize the lands a
and, therefore, it seems to be a writ th
motion to the Court and in cases of n
stat. of *Hen.* 8., but since that statute
capias, *levari*, or extent, without an
touching the goods."

The opinion of Sir *Edward Coke*
have been misapprehended. I do no
to affirm that the king had no power
tent for the levying of his debts *befor*
that the particular writ of which he g
extract, had been the usual process t

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and was so at that day. Indeed, the very
e in the eighth chapter of *Magna Charta*,
he is commenting, "*Nos vero vel Ballivi*
eiziemus terram aliquam vel redditum pro
o quamdiu catalla debitoris præsentia suffi-
bitum reddend et ipse debitor paratus sit
ere," was introduced in ease of the sub-
purpose of restraining the power of the
correcting an abuse of the prerogative, by
he seizure of the lands and rents of the
r, where goods and chattels could be found
satisfy the debt. Lord *Coke* observes upon
, that "by order of the common law, the
debt had execution of the body, lands, and
debtor:" and adds, "this is an act of grace,
eth the power that the king had before."
xt and the comment therefore conspire to
ord *Coke* could never intend to ascribe the
e process of extent to the stat. of *Hen.* 8.
reports of that eminent lawyer are replete
ons confirming the prerogative right of the
sue process of this description from the
s. I will cite one case only from his re-
of of this position. Sir *William Harbert's*
was there resolved, that at the common
y, the lands, and the goods of the king's
comptant were liable to the king's execution;
saurus regis est pacis vinculum et bellorum
, therefore, the law gave the king the full
t: and therewith agrees 5 *Eliz. Dyer*, 224.
Com. 321. *a.*; Sir *William Cavendish's* case,
Walter de Chirton's case; and infinite pre-
he Exchequer, to prove that for the king's
y and land of the debtor shall be liable by
law before the stat. 33 *Hen.* 8. *c.* 39.

(*a*) 3 *Rep.* 12 *b.*

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I have before observed, that Lord *Coke* gives onl
partial extract of the usual process which he state
have issued since the stat. 33 *Hen.* 8. If the whol
it had been inserted it would have appeared from
concluding part whether it issued from the office of
king, or of the lord treasurer's remembrancer.

The long writ, introduced and commented upon
Lord Chief Baron *Gilbert* in the chapter in which
expresses his doubts respecting the accuracy of L
Coke as to the period of time when that species of
cess was first issued for the purpose of securing the ki
debts, was undoubtedly a writ from the office of
king's remembrancer; as appears from the conclu
part of it, containing an injunction not to sell until
further order of the Court; from the bonds rem
ing in the custody of the king's remembrancer;
from referring in distinct terms to the statute 33 *He*
as the authority from which it emanated, and b
also signed by *Masham*, who was at that time an offi
not in the lord treasurer's but in the king's rem
brancer's office.

Without professing to have examined the infinit
precedents to which Sir *Edward Coke* alludes
searches I have made have satisfied m
that department of the revenue office
Exchequer under the control and m
lord treasurer's remembrancer, a st
process or writ, combining in effect th
levari facias, and *capias corpus*, has,
times, been issued upon special applic
the necessity of the case, without any p
or notice, and directed at once again
chattels, lands, and tenements, and b
debtor, to levy all such debts as by bei
the revenue rolls in that office were bec
of recorded debts or duties.

y and usual course of proceeding to the pipe office, and enter them l to the summons of the pipe, to cess; and if returned *nihil* by the hem into a schedule as described ı *Gilbert*, and send them into the surer's remembrancer, to be levied ative process, or long writ, which two stated seasons of the year for ch debts.

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ur Lordships' patient attention by ıich have led me to conclude the *Gilbert* may have confounded the ı the office of the king's remem- hority of the statute 33 *H.* 8. with has been immemorially the course ɔquer to issue from the office of the nbrancer. It may be sufficient for ıresent enquiry to take it upon the ent a Judge, who presided at the Exchequer, that long anterior to such debts of the crown as were t roll in the treasurer's remem- be levied by a process having the n immediate extent. (*a*) I would, my observations upon this first y with a passage from Lord Chief *atise on the Court of Exchequer*, of a later *teste* supersedes an exe- by a former writ; because by the ɔommon law if there had been an ct's suit, and afterwards an extent,

arning found d ela- ıranch

of the Court of Exchequer which relates to the office of Lord Treasurer's Remembrancer.

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the execution was superseded until cuted, because the public ought to be property."

I proceed to the second branch far the statute 33 *H.* 8. *c.* 39. restr prerogative. In considering the effect of such of its clauses as h question, we should remember tha period of time when that monarch of his power, when the revenues of recently greatly augmented by the solution of the abbies and monaster increasing commerce and prosperi nor can we forget that the history o more frequent examples of sacrifice subjects than of any voluntary surre ledged prerogatives to them.

Upon the first forty-nine section lating to the erection of the court king's lands, its officers, and their have long since ceased to exist), it l to make any observations.

The object of the legislature in enactments, from section 50. to 56 more speedy recovery of debts due obligations and specialties which no act) enrolled of record were not an prerogative process of extent. Th gave them the force and effect of ledged according to the statute st It gave also to the king his costs as It gave to each of the several cou recently erected as to those alread tioned in the fifty-fifth section, th power and authority to commence for debts and duties grown due to t of obligations remaining in each of

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and to hear and determine them, and to tion upon the body, lands, and goods of ondemned therein. But it appears to me a ppose that, because in directing in what courts (some of those courts being then ted) the suits shall be commenced, and may in their discretion be used, (mention- *ia*, the *capias*, *extendi facias*, &c.), that power of issuing such process was given ime to the Court of *Exchequer*. As applied s and specialties, which before that statute in *pais* not yet ripened into matters of mit *they* were not liable to the immediate rendered mature for that process by be- led of record.

ns to which I have referred, from fifty to ear to me exclusively applicable to the debts ccruing in respect of the obligations and entioned in those sections.

. enlarges the jurisdiction of the several n enumerated; extends their authority to a subjects having no relation to the pre- d after introducing various regulations ffices of receiver, auditor, accomptant, enalties upon them for the breach of luties) the statute proceeds to enact the d seventy-fourth sections, the last of sion to the present question.

on directs, that in all actions and suits of any debts which shall accrue to the f any attainder, outlawry, forfeiture, or , or by any other collateral way or e sufficient to declare generally, without cumstances at large according to the e common law. Then follows imme- controverted 74th section, in the fol-

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lowing words: — "If any suit b
or any process be hereafter aw
the recovery of any of the king's
suit and process shall be prefe
any person or persons; and o
heirs and successors, shall have
any defendant or defendants of
before any other person or pers
king's said suit be taken and
awarded for the said debts at t
the king, his heirs and succes
given for the said person or pers

The first branch of this clause
viso, contains a plain declarati
rogative right under the common
at all times entitled to have his
have *first execution*.

The proviso was undoubtedl
some qualification or restriction
least to confer a privilege upon
question arises as to the extent
privilege. By stat. 25 *Edw.* 3.
withstanding the king's ancient
writs of protection) was empo
debtor, and to proceed to jud
execution until the king's debt
seems to me that this further pr
the 74th section; viz., that he
restrained from proceeding to
those cases to which that section
the crown had neither commence
any process before his judgmen
legislature did not, I conceive, in
cases of conflicting or concurrent
to remove the restraint continuin
the time of the passing of the act

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ut execution without being guilty
ıe law, which before the statute
ıot do. The section being silent
shall be first satisfied, imports
view of it) that the subject's exe-
still leaving the prerogative right
n extent, unimpaired.
be the true construction of the
of the crown does this seventy-
' Does the proviso or condition
all the preceding clauses in the
nd limited in its operation to the
seventy-third section immediately
estion is involved in some ob-
ion of the sections would favour
ıited construction; but the words
ection are sufficiently general and
ırace other debts than those de-
y-third section as accruing to the
ıutlawry, forfeiture, or gift of the
er collateral way or means." At
restriction be construed to apply
'own debt, so as to include the
lties mentioned in the fiftieth sec-
the difficulty, nay absurdity, of
of parliament, passed for the pro-
itating the speedy recovery of the
g them the force and effect of a
instead of expediting their pay-
in a more unfavourable position
ects. In every race between the
ıe point of time to determine the
s not the moment in which judg-
t that in which the execution is
ff; whereas the construction con-
ho impugn the preferable title of
the

the crown, would give to the subjec
a judgment, the power of postponin
king's execution, unless there had be
his suit, or an award of his process
ment was signed.

I interpret the words "debts" in t
it with reference to all the previous
statute) to mean such debts as not
record, are in *fieri only, unascertain*
to be recovered through the medium
commenced or "process to be awa
as informations for penalties always
prayer that process may be awar
struction would also embrace such d
tioned in the immediately precedi
unless the crown had in all such ca
menced the suit or awarded its pr
having obtained a judgment, might
execution, and thereby, in obedience
the proviso, prevent the king from
cution, to which before that statute h
do not, however, read the clause a
crown from issuing an extent under
stated in this case.

I come next to consider the questi
seizure by the sheriff under a *fieri fa*
a judgment-creditor, the property in
becomes thereby altered so as to be n
the extent of the crown. The crown
titled to priority in the execution o
virtue of its prerogative. The subject
ence of any such prerogative, assertin
execution has once begun by an act
the crown has no longer any right
subject's execution from that time bei
preference.

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the crown, as *representing the revenue*, and an individual creivate claim, are at issue. For *Uppom* v. *Sumner* and *Rorke* v. wn, *The King* v. *Wells* and *Alloper* and *Allen*, are relied upon r Lordships are constrained to decisions you will abide, for no an reconcile them.

comment upon these cases, and applicable to this subject, and be deduced from them, which eard from those who have preshortly the reasons which have the latter judgments delivered quer, as containing the sounder and as resting upon the more judgment pronounced by the Chief Justice *De Grey* presided, constitutional lawyer Sir *William Gould*, and Mr. Justice *Nares*, view, the strongest claim to the *glish* lawyer; but I must confess, ms assigned, and the authorities nent of the Court of Common *mer* professes to be founded, I al assent to it. The whole argu- *Hen.* 8., as reported in 2 *Sir W.* comprised in this single observrmer part of the seventy-fourth the old prerogative law, and the so that it shall not take place or the subject. The authorities nt proceeded are still more un- of *Lechmere* v. *Thoroughgood*, as , 123. and 3 *Mod.* 236., is relied

on

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on as the prominent ground of t
together with *Attorney-General* v.
passage extracted from Lord Ch
Digest, vol. ii. 238., viz. "if execu
ment against the king's debtor, a
exponas an extent comes at the king
cannot be taken on the extent," are
prehending the pith and marrow of
this solemn judgment. As to the
Andrew, Lord Chief Baron *Steel's*
to have proceeded on the ground
which was an *elegit*, was *perfect and*
the extent issued: *Hard.* 27. He s
title is prior to the king's, and *is*
adds, "*Stringefellow's* case, in *Dy*
And as to the passage in Lord Chi
Digest, vol. ii. 358., I do not under
ing the preponderating weight of h
into the scale to guarantee the cre
where he cites cases to support it.

Upon the authority, therefore, of
Lechmere v. *Thoroughgood*, admitted b
to be a little obscure, from being r
meal and in different books, is built
would rather say, the *untenable* pr
execution *begun*, but not completed
comes too late.

I have examined with care the se
case in *Comb.* 123., 3 *Mod.* 236., 1 *S*
160., from which it will appear, that
pass by the assignees of a bankrupt
of *London* and others for seizing g
facias against the bankrupt after an
committed by him.

(*a*) *Hardr.* 23.

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y was committed on the 18th of
n the 29th. After the seizure,
suit of the crown. The case
Court — once in *Trinity* term,
d. gives the account; and again
berbach and *Shower* refer. "The
construction should not be made
passer by relation, for the taking

re, as to the right of the crown
erred to the execution, was not
judgment; and supposing Lord
Comberbach imputes to him, viz.
late after the *fieri facias* de-
t could be regarded only as an
lictum.

ion arose in *Rorke* v. *Dayrell* as
ord *Kenyon*, after expressing his
that decision, relied upon this
of his judgment, viz. that as long
btor remained *unaltered*, and an
the subject, and an extent at the
the debtor, the title of the crown
oint to be considered is, in whom
nen proceeds to state, that as the
goods is bound by the delivery
iff, there then remains no pro-
which the prerogative of the

to the judgment of so profound a
tion the soundness of this opinion,
of Lord *Hardwicke* in *Louthal* v.
" That neither before the statute
he property in the goods *altered*,

Eq. Cas. Abr. 381.

but

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but continues in the defendant unt
cuted. The meaning of these w
be bound by the delivery of the w
that after the writ is so delivered, if
an assignment of his goods, unles
sheriff may take them in execution.
was expressed by Lord *Holt* in *S*
Another (*a*), who says, "If writ
livered to the sheriff against *A.*, ar
rupt before it be *executed*, the exe
and, consequently, the property
absolutely bound by the delivery of
But the teste of the writ binds ag
of the party himself." The same
Philips v. *Thompson*. (*b*) Lord *H*
ment I am commenting upon, sa
considered is, in whom is the prop
by that test. If the property be
the seizure and before the sale, I
it? The debtor may, at any mo
pay the debt and demand the go
sale necessary to retransfer the pro
firm his title. Suppose the good
the custody of the sheriff, to be c
or destroyed by fire, or by an ar
would the execution be satisfied o
Surely not. The judgment of
Bench, in *Thurston* v. *Mills* (*c*),
thority upon this point. Goods w
by the sheriff under a *fieri facias*,
unsold, an extent at the suit of
quent teste issued, under which
subject to the former seizure, and
under a *venditioni exponas* from th

(*a*) 1 *Ld. Raym.* 251. (*b*) 3 *Lev.* 1

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ived was brought by the Plaintiff against the sheriff for the proceeds *Ellenborough*, in delivering his judg- neither the money nor the goods the time of the action brought, the aintiff. The sheriff had, indeed, *feri facias, but the Plaintiff acquired y the sheriff's seizure.* If they had ands of the sheriff, the Plaintiff e the loss."

cludes his judgment in *Rorke* v. words, "With respect to what is n said by Lord *Mansfield* in *Cooper erbach* having mistaken Lord *Holt's* v. *Thoroughgood*, it is as probable t observation is misstated."

before he delivered his judgment in d fortunately referred to his *own itty*, which has since been published a his Lordship's original manuscript, ng, he must have borne testimony Sir *James Burrow's* report of Lord t in that particular. The notes of Sir *James Burrow* on this point are ony, that the one may be considered other, and I will transcribe them. ported by Sir *James Burrow* to have *rbach*, in giving the judgment of the only sensible part of his whole re- to me, that he did not understand t on the former day, which is the ort of the case,) agrees with *Shower* Court were of opinion, that a con- be made, to make the officer a *tres-*

(*a*) 1 *Burr.* 36.

passer

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passer by relation: for the taking was lawful at the time.' But he must be mistaken in the first part of his report: for Lord Chief Justice *Holt* could never say 'that the property of the goods is vested by the delivery of the *fieri facias*, and the extent for the king afterwards comes too late.' No inception of an execution can bar the crown." The following passage is extracted from Lord *Kenyon*'s report of *Cooper* v. *Chitty*, as published by Mr. *Hanmer*, page 422. "This case of *Lechmere* v. *Thoroughgood* is reported in two other books: in *Comb.* 123. the latter part of the case is agreeable to that of *Shower*, that a construction should not be made, to make the officer a trespasser by relation. As to the other part of the report, it is manifest to me, that he did not understand what they were arguing about; for he makes Lord *Holt* say, what he could never say, about barring the extent of the crown. In 3 *Mod.* it is as plain, that the reporter misunderstood what passed; for he says the extent came too late, and that the property was bound by the *fi. fa.*, though the contrary is very clear."

The inference I draw from all the authorities upon the subject, whether the question be considered with regard to executions on statute staple, or to executions at common law, by *fieri facias* or *elegit*, is this, viz. That the extent of the crown must be preferred, if the execution be not perfectly executed by the delivery of the land to the creditor, or by the sale of the goods. That the inception of the execution by the bare seizure of the goods will not bar the crown. That the execution must be no longer in progress, but completed, and that, until the actual sale, the property is not altered or divested from the original owner.

Mr. Baron *Wood*, in the elaborate judgment delivered by him in the Court below, and reported in 8 *Price* 314., seems, throughout his most able argument, to admit, that in order to exclude the process of the crown, the execution

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ct must be *executed*; but he in-
eizure by the sheriff is for that
execution: but neither the cases
ning to illustrate that position,
ing me a convert to his opinion.
by that learned Judge, to shew
preference is determined when
ition has begun, proves on the
to my mind, that it is not deter-
s execution was perfect and con-
very of the land to the creditor

ining to be considered, viz. whe-
ed by the seizure such a special
as to defeat the process of the
discussed by my learned Brothers
and to whose judgment I take
ecially to my Brother *Alderson*'s,)
and incorporating my opinion
I willingly spare your Lordships
to my examination of it in detail.
nvested with power as the minis-
, to protect the property, whilst
ly, for the benefit of those who
cannot be disputed. Against a
intain trover or trespass. But
d no inference can be drawn un-
of the crown. He may still be
His Majesty's process of extent;
claim of property in third persons
capable of being established.
has accurately defined the state
property as being in *custodiâ*
dismiss this last head of enquiry

on. 239. 4 *Ib.* 10.

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with an observation of Lord *Hobart's*, extracted
his judgment in *Sheffield* v. *Radcliffe* (*a*), when
menting upon *Stringefellow's* case (*b*), so often refe
to. The passage is in these words: "*Stringefellow*
an extent upon statute staple against *Brownesoppe.*
sheriff of *Bedfordshire* extended the land and appr
the goods, and seized them into the king's hands;
before *liberate*, an Exchequer writ for a debt of 100*l.* c
king's, to be levied upon *Brownesoppe*, came to the sh
who returned on the writ this special matter into
Exchequer, and he made the same return into the C
cery upon the *liberate*, and that there were no
goods. *Yet he was enforced, notwithstanding the cu
of the law, to serve the king.*"

For these reasons, I am of opinion that the k
extent is entitled of right to be preferred to the subj
execution, and that there is no solid distinction
made between an extent in chief and an extent in a

I fear that I have rendered myself obnoxious to
imputation of trespassing too largely upon your L
ships' valuable time. My apology for doing so ma
found in the importance and difficulty of the sub
which has for so many years been considered in
minster Hall as *vexata questio*, distracting and divi
the opinions of the most enlightened Judges. If
judgment which I have humbly submitted to your L
ships be deemed erroneous, I shall at least have
consolation of reflecting that I am under the shad
great authority. "*Magno se judice quisque tuetur.*"

GASELEE J. My Lords, I have the misfortun
differ in opinion with those of my brothers who
preceded me, and I understand from a great majori
those who are to succeed me in addressing your L

(*a*) *Hob.* 339. (*b*) 1 *Dyer*, 67.

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ı; and when I consider that the
Chief Justices to whom this case
it of error brought to review a
ven in the Court of Exchequer
ıdant in error, reported to the
the question was one which has
Westminster Hall for a great
had been a difference of opinion
nster Hall, the Court of King's
l the Court of Common Pleas,
ıe extent was not entitled to
ion at the suit of the subject;
equer has uniformly decided the
extent was entitled to priority;
, having heard the case argued,
naturely, had not been able to
. the subject, and to agree upon
l give to the Lord Chancellor;
ıat so considerable a majority of
formed an opinion adverse to
of the best consideration I have
subject.

ropounded by your Lordships
Judges branches out into two;
roperty is altered by the seizure
: writ of *fieri facias*; and, se-
statute 33 *Hen.* 8. *c.* 39. *s.* 74.
process of the crown, and pre-
fect unless it be issued antece-
xecution, or, in the words of the
suit be taken and commenced,
he debt at the suit of the king,
before judgment given for the
ıs. In considering the first of
call to your Lordships' attention
case is not, as in many of the

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cases in which the decision has been given by the C of Exchequer in favour of the crown, whether claimant has such a property in the goods as to en him, according to the technical practice of the cour come in and claim the property, under the usual upon the return of the writ and inquisition into court; in which case no one can be allowed to trav the king's title without showing title in himself; here the question is, generally, whether the writ be executed by the sheriff by extending the same g into the king's hands, and selling them to satisfy crown debt, without regard to the *fi. fa.* under w he had first seized them. It is admitted, and, ind after the decision in *Swain* v. *Morland* (*a*), it is too to deny, that after an execution is once executed a suit of a subject, an extent coming to the sheriff o part of the crown to be executed on the same prop comes too late. One question, therefore, on this of the case is, at what time may an execution be sa be executed? Now, my Lords, there are many au rities which lay it down, that, by the seizure (the being but the formal part of the execution), the perty vests in the sheriff. The first author trouble your Lordships with on this point is of Lord *Holt*, in the case of *Lechmere* v. *Th* reported in several books, and, amongst othe *berbach* 128, in which Lord *Holt* is stated to — "The property of the goods is vested very of the *fi. fa.*, and the extent afterwards comes too late, and that, on the statute of perjuries." It is true the case does not appe been decided upon that ground, but because being lawful at the time, the officer could n a trespasser by relation; and that Lord M

(*a*) 1 *B.* & *B.* 370. 3 *B. Moore*, 740.

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itty (*a*), says that the reporter must be mis- first part of his report. In 4 *T. R.* 411., *n* is stated to have said, with respect to osed to have been said by Lord *Mansfield*, . *Chitty*, of *Comberbach* having mistaken opinion in *Lechmere* v. *Thoroughgood*, it is t the report of that observation is mis- in the *Banker's* case (*b*), Lord *Holt* says, *fi. fa.* is delivered to the sheriff, and upon levied, the property of the goods is altered, ff becomes a debtor to the Plaintiff. The v. *Withers* (*c*) is also to the same effect. as follows: — *F. Dives*, as administrator of overed 303*l.* against *Clerk*, upon a bond to upon judgment by default in the Com- nd sued out a *fi. fa.*, tested of *Trinity* term, turnable in *Michaelmas* term, directed to of *London*, which was delivered to the e 1st of *August* in the same year, who, on st of *August* seized goods to the value. administrator, died 9th *September* follow- heriff returned the seizure to the value, *sed* ., *pro defectu emptorum*. On the 29th of e sheriff was removed and another put in. *lerk* now sued out a *sci. fa.* against the then stitution of his goods; and upon demurrer, s given against the Plaintiff in the Court Pleas, and he then brought a writ of error. e case having been twice solemnly argued he Court *seriatim* affirmed the judgment. *Gould* says, — "The execution is exe- life of the administrator, and the sale, viz., art of it, may be done by the same writ. by the levying the goods by a *fieri facias*,

(*c*) 6 *Mod.* 290.

6.
Trials, 28.

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as he seizes the goods, gets a property in them ag
all persons, and may have trespass against the
owner if he gets them; and so he may have trove
appears in *Wilbraham* v. *Snow* (*a*), where Chief Ju
Kelynge held that he gains a general property: bu
the rest say that it was only a special property, so
sell, &c. This is not like the case put before
extent; for in that case there must be a *liberate*,
is by award of the court." Mr. Justice *Powys* sa
"This execution is so far completed that it is a ve
of the property in the sheriff. The selling is
formal part of the execution; and by the seizure
writ he has authority to sell, and the *venditioni ex*
adds not to his authority, but is to spur him on to
And Mr. Justice *Powell* says, — "Execution
entire thing; and therefore, where a sheriff levies g
and while they remain in his hands for sale
sheriff is chosen, he who begins the execution sh
on with it, and sell the goods, and not deliver
over to the new sheriff, who is the officer o
Court. The reason is, that execution is one
thing, (Year-Book, 34 *H.* 6. *pl.* 36.) and, ther
where it begun, it shall end; and that is the
that a *supersedeas*, after execution begun, shal
supersede it upon error, because it is an executio
the first levying of the goods, and not like the c
an *extendi facias*, because the extent is only a
into the king's hands, and there must be another
of the Court, viz. a liberate to deliver them over
plaintiff." By *Holt* C. J. "It is true, after he has
goods to the value of the debt, though he be
office, yet he is bound to make sale of the goods,
make a return; and when he has made a return
seizure of the goods, and that they remain in his

(*a*) 2 *Saund.* 47.

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hat is not a discharge of the com-
: only an excuse that he has not
compellable by law to bring it in;
ai exponas does lie, yet a *distringas*
: and there are two sorts of *dis-*
tem before mentioned, (Year-Book,
one a *distringas* to the new sheriff,
e to sell the goods and bring the
e other, to distrain him to sell *et*
ntes to deliver to the new sheriff
Now, if a *distringas* lies for the
the old sheriff to sell, that shews
authority to sell by virtue of the
, which commands the new sheriff
e to sell and bring in the money,
Bastall's Ent. 164. *Thes. Brev.* 90.)
heriff is compellable to sell, having
t should hinder, in this case, that
withstanding the Plaintiff's death ?
ible and compellable upon them
he money, as if the plaintiff had
tes the goods by virtue of the writ,
ually discharged, though they are
ntiff must depend upon his exe-
that; he has no farther remedy
but altogether against the sheriff.
upon an ejectment brought by an
non, and it was held that the ex-
writ was abated, and no matter
lied before the return of seizure or
ere be no act of the Court to be
d out which commands the sheriff
tended to the party, if, there, the
tor die after the inquisition and
that case the death of the Plain-
e execution; and that appears by

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the case of *Harrison* v. *Bowden* (*a*), though not so plain." If he do not sell between the teste and retu the *distringas*, he shall forfeit issues; and after g once seized, no writ of error or *supersedeas* shall sta sale. In *Wilbraham* v. *Snow* (*b*), the point was, tha sheriff may maintain trespass or trover against any son who takes away goods which he has seized in cution: *Mildmay* v. *Smith*. (*c*) And by seizure of goods in execution, the sheriff has property in t so that he may reseize them, and sell when he is i of office as before. In the case of a *fi. fa.* there i further act to be done. Although the terms of the direct the sheriff to bring the money into cou render to the Plaintiff, it is not necessary he shou so; he not only may pay it over himself to the Plai but in the case of *Perkinson* v. *Gilford* (*d*), it is sa action of debt may be maintained against him o executors, if he does not do so after he has sol goods.

It is true, that authorities have been cited on other side; and, amongst others, *The King* v. *Pec* In that case a *fi. fa.* issued out of the Court of C mon Pleas at the suit of *Robarts* against *Peck*, w was tested 3d of *April*, by virtue of which the sh levied the goods, &c.; but before the sale thereo the return of the writ, an extent came to the sh at the suit of the crown to levy the goods, &c. of tested the 2d of *May*. The sheriff returned this sp matter on the *fi. fa.*, and likewise upon the extent the Court of Exchequer; on which it was said, that had possession of the goods the 30th of *April*: which Mr. *A.* moved to quash the inquisition, and *F.* moved that the sheriff might amend his re

(*a*) 1 *Sid.* 29.
(*b*) 2 *Saund.* 47.
(*c*) 2 *Saund.* 343.
(*d*) *Cro. Car.* 539.
(*e*) *Bunb.* 8.

B

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quashing the inquisition, which
, he did not see how the sheriff
he Lord Chief Baron *Bury* and
of opinion the sheriff might amend
rder was made for that purpose,
heriff wanted to indemnify him in
n moved against him in the Com-
rn of the *fi. fa.* There is a note
terms: — N. B. It was taken for
the goods were levied by virtue of
before the teste of the extent, yet
e crown. But query, if they had
cution had been executed. *Stringe-*
een very much relied upon on this
authority on the part of the crown.
rted in *Dyer* 67 *b.*, *Stringefellow* v.
: *Stringefellow* sued a writ of *extendi*
ry, to have execution of a statute
esoppe, directed to the sheriff of
tent of the lands of *Brownesoppe*,
ccordingly into the hands of the
e writ, but did not make livery;
of the king's prerogative issued
r, reciting the prerogative which
e to be first served and paid by
anded the sheriff to levy the debt
wnesoppe owed him, 100*l.*, of the
nd if he had not sufficient, then to
d this writ was delivered to the
the return of the first writ; but
t returned at the day: and the
ecial matter upon the writ of the
he had returned the writ into
bove, and averred in his return
goods or lands to be extended

besides

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besides the goods, chattels, lands, and tenements extended; and it was holden in the Exchequer fo that the sheriff should be amerced if he woul amend his return, viz., to return the extent int Exchequer for the service of the king's debt. Justices *Hales* and *Bromley* were of the same op because the property of the goods and land were *Stringefellow* before they were delivered to him writ of *liberate*. The distinction, however, be that case and the case of a *fi. fa.* has not only bee fully pointed out in the opinions of some of the J in the case of *Clerk* v. *Withers*, above cited, but very pointedly observed upon by Mr. Baron *Wo* the case now in judgment, in 8 *Price* 314. It is the extent is not the execution, and gives no aut to the sheriff to sell or deliver over to the par merely authorizes the sheriff to seize the propert not to do any thing with it until the *liberate* i which is, in fact the execution. The *fi. fa.* comm the sheriff to make the money of the goods; a further authority is requisite to empower the she sell, and to pay the money over to the plaintiff. distinction is also shewn in *Playne's* case, in *Cro. El* A lessee for years was obliged to pay his rent. In upon it, he pleaded that the lessor was bound statute, and upon that an *extendi facias* was award seize the lands and tenements of the lessor int queen's hands, which was executed accordingly; upon that a *liberate* was awarded; and in the time, between the *extendi facias* returned and *li* awarded, the rent was incurred for which he was c able to the queen, and demands judgment. opinion of the whole court was clear to the con Before the *liberate* awarded, *nihil operatur*, for h mains always tenant to the lessor, and chargeab

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rent; and the writ before, is but of form
ks of the seizing into the queen's hands;
ver seen that lands were seized upon that
at here, upon an *extendi facias*, it is clearly
hing was divested out of the debtor until
In *Smallcombe* v. *Cross* (*a*), which has
n the part of the crown, there is the fol-
—In this case Mr. *Northly* said, *arguendo*,
e common practice at this day, that if a
vered, and the goods appraised and sold,
is not returned, and an extent for the king
of the Exchequer, it will over-reach the
But, *per Curiam*, it is a very dangerous
: is, however, now admitted, that the sale
ne crown; and I only mention this note to
far the argument has, in earlier times,
l in support of the alleged rights of the
passage at the end of the case of *The*
neral v. *Capel* (*b*) was also cited on the
viz. "extents have been upon goods ac-
l by virtue of a *fi. fa.* and in the sheriff's
extent coming before a bill of sale made,
operty was not altered." This passage does
to be part of the judgment of the Court in
y-General v. *Capel*, in which the question
r the extent was too late, coming after the
of bankruptcy, but before the assignment.
thing in the case, wanting, or in any way
the inference; which, as Mr. Baron *Wood*
judgment, is a mere *gratis dictum* of the re-
at case.
lt of a due consideration of the foregoing
to me to be, that the property is altered,
own barred by the levy under the *fi. fa.* It

l. Raym. 251. (*b*) 2 *Show.* 481.

is

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is not necessary to go the length of shewing that sheriff has the general property in the goods. T are several cases shew that where the ge property remains in the debtor, yet if another has special property in or lien upon the goods, the c shall not take the goods but subject to that Thus, an equitable mortgage; which binds the cr and against which the crown is entitled only tent; *Casberd* v. *The Attorney-General* (*a*): or the of a factor, who has accepted bills to the amount o value of the goods consigned to him; *The Kin Lee* (*b*): or of a wharfinger, on the goods of his custo in his possession, for his general balance, which has decided to be available against the crown; *The Ki Humphrey*. (*c*) Mr. *West's Treatise on Extents*, p He says the plaintiff in an execution may be sai have an interest in goods which have been taken u his execution, the goods being in the custody of the and the sheriff having the special property in t the general property remaining in the defendant u the execution. But it is said that that rule ca apply to the case in question, because at any time b sale, and after the seizure, the debtor may, by ment of the debt, suspend the sale and stay execu The same answer would apply to the case of the fa wharfinger, and other persons above named, in which the debtor, upon payment of the debt, re the property.

If the decision on this part of the case is in favour o Plaintiff in error, the remaining question will not a but if not, I am of opinion that the statute 33 *H.* 8. c *s.* 74. abridges the prerogative process of the crown, prevents it from taking effect in this case, the king's sui

(*a*) 6 *Price* 411.
(*b*) 6 *Price*, 369.
(*c*) 1 *M'Clell. & Young*

ha

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mmenced, or process awarded at given for the plaintiff on the *fi. fa.* words of that section: — "And e authority aforesaid, that if any ıken, or any process be hereafter the recovery of any of the king's ıe suit and process shall be pre- of any person or persons: and lord the king, his heirs and suc- execution against any defendant r his said debts before any other always, that the king's suit be r process awarded for the said rd the king, his heirs or succes- iven for the said other person or eeding to the further consider- : case, I should call your Lord- ıct, that, in the present case, so being taken or commenced, or the judgment was given for the was not due to the king, but to debtor, and was not put on the ving the judgment, the issuing of al seizure of the goods under it. *ney General* v. *Andrew* (*a*), it was ourt, that the statute did abridge case was, Sir *William Harrison* gments in debt to one *Andrew* ound to one *Fielder* on a bond e judgments. *Fielder* assigned *ndrew* takes out execution upon *legits*: by one he has the moiety, noiety of Sir *W. Harrison*'s lands ss issued out of the Exchequer

rdr. 23. in 1665.

for

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for the debt assigned to the king, and the pri
question was, whether or no the king should be p
red in this case. After argument, the Court, in *T*
term 1656, gave judgment for defendant. Baron *F*
said, "The king has many prerogatives *pro bon*
lico, but in the case in question the statute 33 *H*
abridges the prerogative, and controls the commo
Affirmative statutes do not alter the common la
negative statutes do; and here is a negative im
See *Stringefellow*'s case in *Dyer*, 67 *b.*; also *Lassel*'
in *Dyer*, 364." Baron *Nicholas* agreed: "Before th
tute 33 *Hen.* 8. the king was not bound, but the s
has made an alteration, though it sounds in the a
ative; for it enacts a new thing, and *ita quod* ma
condition precedent, and a limitation." He then
to certain authorities as shewing how such statut
to be expounded, and that the clause would el
idle. Chief Baron *Steel*: "The subject's title is
to the king's, and is executed: the words of the s
of 33 *Hen.* 8. are introductive. *Cecil*'s case (*a*
Stringefellow's case are unanswerable." It is obse
that although so much stress is laid upon *Stringefe*
case on the part of the crown on this occasion,
Baron *Steel* and Baron *Parker*, in the above ca
The Attorney General v. *Andrew*, cite it as being
clusive in favour of the subject. The case of *Upp*
Sumner (*b*) is precisely the same as the present. *U*
the plaintiff, in *Easter* term 17 *G.* 3., recovered a
against *Cann* in the King's Bench, in debt for 1
and on the 16th of *April* 1777 sued out a *fi. fa.*, re
able on *Monday* next after the morrow of the *Asce*
12th of *May*; a warrant on which was, on the 1
April, delivered to the officer, who on the same da
the goods, and kept possession of the same by virt

(*a*) 7 *Rep.* 18 *b.* (*b*) 2 *Blacks.* 1251. 1294.

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e 24th of *April*, before any sale of was sued out and delivered to the oods of *Cann*, to levy 621*l.* 4*s.* 8*d.*, and a warrant was on the *Monday* officer, who then had the goods in the former warrant, and who, two oods appraised, and on the 30th of tion on the extent. The plaintiff ending and putting in his claim, the 23d of *May*, and the sheriff y *Uppom* to return the writ, re- When the cause was first called on, l thought they could not support lingly judgment was given without however, afterwards argued, and ; Mr. Justice *Gould* delivered the f Chief Justice *De Grey*, who was nt, himself, and Justices *Blackstone*, his case the extent did not take , the king's suit being commenced It had been contended in argu- *Grose*, who afterwards was one of ed with the rest of the Court in v. *Dayrell*, that the statute *Hen.* 8. rogative in the particular revenue d mentioned in that act. But in r. Justice *Gould*, after stating the ie act, says, about seven sections 74, 75, 76, 77, 78. and 80. con- s extending to all the king's sub- ble to all the king's courts as well venue, where the subject of them tion. Indeed, he says it would ave one law prevail in the King's Pleas, and another in the Ex- chequer

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chequer and Duchy, with regard to such questio
the present, the priority of the king's debts before
due to a subject. The learned Judge, after statin
seventy-fourth section of the act, says, "The fi
part of this clause is declaratory of the old prero
law, the latter is a new restriction of it, so that it
not take place after judgment given for the sub
With respect to the case of *Lechmere* v. *Thorough*
upon which so much has been said, he says, "In
mere v. *Thoroughgood*, it appears by *Comberbach*, 12
3 *Modern*, 236. that first *Herbert* and then *Hol*
clearly of opinion, that after execution begun, bu
completed, (and of course after judgment signed
king's extent came too late. This case is a little ob
from its being reported only piece-meal, and in dif
books: but with some attention it will be found
clear and consistent, by reading the several part
in order of time as they occur, viz. the plea
2 *James* 2., 2 *Ventris* 159.; first argument, 4 *Ja*
3 *Mod.* 236.; second argument and judgment, 1 *W*
and *Mary*, *Comberbach* 123., 1 *Skower* 12.: and a
quent action, between the same parties in effect,
Common Pleas, viz. *Lechmere* v. *Toplady*. (*a*) I
Attorney-General v. *Andrew* (*b*), it was held b
Court of Exchequer, that when there was a judg
and an execution by *elegit*, a debt of the king pr
the judgment, but the process thereon sued out a
should be postponed to the judgment. And from
authorities Lord Chief Baron *Comyns* in his *Dige*
lects this doctrine, that if execution be upon a judg
against the debtor, and before *venditioni expon*
extent comes at the king's suit (which is the ver
at bar,) those goods cannot be taken on the e

(*a*) 2 *Vent.* 169. (*b*) *Hardr.* 23.

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also supported by *The King* v. ase of *The King* v. *Dickinson* was l by judgment to *B.*, by bond to simple contract to *E.*, and died. o the king, caused the debt due into the king's hands, and upon sued against *Dickinson*, executor e return of it, *C.* and *D.*, the ed judgment, and then *Dickinson cias* the prior and the subsequent orney-General demurred. The *ary* term 1691, were, first, whe- dgment should be preferred to the admitted that the preceding judg- ed. The second is unnecessary to adjourned to this term, (*Easter*, n it was adjudged for the king, e preferred before the subsequent ny bond; *Hardres*, 23.; but a pre- ld be preferred before it, upon the xth section of 33 *H.* 8. *c.* 89. "So suit be taken and commenced, or the debt of the king before judg- er persons."

(*b*), the plaintiff had obtained a erm 1787, against *Clark* for 727*l.* *fa.*, tested 28th of *November* 1787, *uary* 1788. Writ delivered to the 1788, who, on the 8th, seized the ale, viz. 11th of *January* 1788, a that day issued out of the Ex- to the crown under the seal of *April* 1782, for 300*l.* payable at a of the *fi. fa.*, and then unpaid. On

52. (*b*) 4 *T. R.* 402.

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ooper v. *Chitty*, of *Comberbach* having
t's opinion in *Lechmere* v. *Thorough-*
able that the report of that observ-
' Justice *Ashhurst* says, " The case
r certainly underwent a great deal of
e it was decided; all the prior au-
ughly examined at that time. Unless,
be shewn that the case proceeded
les, it ought to govern the present.
tatute of *Henry* VIII. are clear and
ng's suit shall be preferred to that of
o always, that the king's suit be taken
process awarded before judgment
her person or persons.' Now, this
ave a new prerogative to the king,
, which he had not before; by that
ssue immediate execution in cases
t before; for before he had only a
on when the debt was upon record.
a new prerogative, the legislature
ain him; and they have in express
n, where the subject's judgment is
ion of the king's execution." Mr.
" This case arises on the statute of
ious to that act the crown could not
cution on a bond debt. Though the
ady happened on this statute shew
to be confined to bond debts only,
o all debts and executions: it is so
rms by Lord *Coke* in Sir T. *Cecil's*
ct of parliament be restrictive on
a great way to determine this ques-
t expressly requires that the king's
nced before judgment is given for

(*a*) 7 *Rep.* 18 *b.*

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the subject. Now, that was e
case in *Hardres*, where the wh
that the statute does abridge
And there Chief Baron *Ste*
title is prior to the king's, an
ground I put the question to t
'What effect a judgment obt
have, where he lay by till th
cuted?' I am inclined to thir
execution by the subject woul
not necessary to decide that p
As to the effect of the statute
possible to have a more dire
striction on the king's prerog
19. *b.*, where it is said, 'The
and advantage to the king; fir
made to the king in nature of
in giving remedy to the kin
made to others to his use;
and damages; fourthly, in sui
debts; fifthly, in charging t
heir, who hath the land of the
therefore, it was the intent
subject, that where a new pr
levying of the king's debt in
ficial manner than the king
also should have some new
before.' Now, that new bene
ference in cases where his jud
the extent of the king issued.'
"The simple question is this,
issuing an extent upon a bon
ment of a subject. If the crow
arise upon the statute of 33
Hist. Exch. 165. Now, the w
are extremely pointed to shew,

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secondly, how far the prerogative assisted in these cases, and how far it is said that '*execution*' in this y to affect lands. But there is no ld be so confined: it must mean tion to which the king was entitled this act, otherwise the king would here he had a prerogative before. nds on the words of this statute. are decisive. First, the case in nted: and there it was not even in this act ought to be confined to land. Then came the case of *The* And Lord Chief Baron *Comyns* (*a*) from the cases, that, 'if execution against the king's debtor, and before an extent comes at the king's suit, taken upon the extent.' Therefore, ons, as on the construction of the Plaintiff is entitled to recover."

of these two cases of *Uppom* v. v. *Dayrell*, came the case of *The llnutt* in the Court of Exchequer, nt upon which the Court delivers there was another upon which the een put, was precisely similar to Court of Exchequer gave judg- And such has been the practice since. That case, however, was pon the case of *The King* v. *Cotton*. hich that case was decided being nent of the Lord Chief Baron in nd *Allnutt* to be, that if the king's before the property was altered, it

(*a*) *Com. Dig.* 538. 648. (G 8.)

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bound that property. The case, I
King v. *Cotton* arose upon a distres
an execution, which, I apprehend, —
by Lord *Kenyon* in his judgment o
rell, — makes a material difference; t
case of seizure under an execution ha
ment at least, a special property in th
case of *The King* v. *Wells* and *Allnut*
Baron relied much on *Stringefellow*'s c
between which and the present cas
pointed out, viz. that in that case t
execution, and was not issued until a
the crown process. The question
brought before the Court of King's I
v. *Mills* (*a*), and twice argued, and th
pared to give their judgment, but on
it was to have been given, they sugge
the form of the action, and directed
upon that point only; upon which the
ment against the plaintiff. What t
which the Court was prepared to give
question, it is impossible to say. I
that it was in favour of the defendant,
nimously so, for if so, they would p
the question at rest for ever. It is no
would have raised another question, an
judgment upon the question so new
respect to the observation which has
the statute were to be construed li
would be in a worse situation than t
king's suit must be commenced befor
for the subject, for then, if the subje
first, he would have precedence thou
were last, which is not the case ever

(*a*) 16 *East*, 274.

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I apprehend the true answer to that ob-
what was suggested by Mr. Justice *Buller*
ent on *Rorke* v. *Dayrell*. He thought it
to decide on that particular case, viz. that
laches or delay on the part of the subject,
would be postponed. I believe, by look-
rit of extent itself, it will appear, by the
that it is issued by virtue of this statute.
passing further, therefore, upon your Lord-
y humble answer to your Lordships' ques-
st, that this writ of extent shall not be
the sheriff by extending the same goods,
into the king's hands, and selling them
crown debt, without regard to the writ of
nder which he had at first seized them;
, that all other things remaining the same,
difference whether the extent was in chief

E J. The question is, whether, under the
cumstances of this case, the execution of
that of the subject is to prevail? Con-
these questions, the case of *Uppom* v.
me before the Court of Common Pleas in
as decided against the crown. *Rorke* v.
terwards came before the Court of King's
as also decided against the crown. Then
Wells and Allnutt (*c*) came before the Court
, and was decided in favour of the crown.
urston v. *Mills* (*d*) came before the Court
nch, in order to have the question set-
r hearing the case argued twice upon the
nt, it went off on a point of form, that

k. 1251. 1294. (*c*) 16 *East*, 278.
R. 402. (*d*) 16 *East*, 254.

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an action for money had and
and therefore the question rem
opinion was delivered, it is i
what the opinion of the Judg
King v. *Sloper and Allen* (*a*) c
Exchequer, and the Court the
The King v. *Wells and Allnutt*
In this case an information in
for a false return was filed, and
crown in the Court of Exchec
after it had been twice argued,
formation for a false return wou
was true in fact though false
opinion I shall not consider
these occasions were more or l
them from having filled one
whether any of them laid too
upon former authorities; such
tract the case into a very great
ficial result. The present cas
settle the law where there have
and I shall consider the case
none of these later cases had oc

In ascertaining what is the kir
tions arise: first, as to its ext
statute 33 *Hen.* 8. *c.* 39.; and, s
that statute. The crown by its
vileges and advantages by the c
a subject has, and a reason for
History of the Exchequer, p. 9
ought to be preferred to the pr
rather, because the king is sup
not to be able to take care
relating to his revenue, and th

(*a*) 6 *Price*,

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to be prevented of his exe-
coming in before him, laches
which the law does not allow."
d *Coke* gives as a reason, "that
mentum belli, et firmamentum
loubt that where the king and
legree, the king's prerogative
e advantages which the king
ction to his debtor that he
ached till he paid the king's
being felt from that, it was
"That notwithstanding such
hich have actions against their
l in the king's court by their
be thereupon given for the
execution of the same judg-
ense till gree be made to the
the creditors will undertake
shall be thereunto received,
gainst the debtors of the debt
also shall recover against them
to the king for them." No
his act of parliament, because
es where protection had been
ors, which has not been done
ars from *Co. Litt.* 131 *b.* that
ntirely fallen out of use.
n it is contended that the king
ght to be first served and paid
his process issues at any time
divesting of the property out
although upon the seizure by
on there is a special property
e general property remains in
absolute alteration, which can
only

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only be by sale. This extent by the judgment-creditor, and seizure by the sheriff the prope debtor; and whether it be so cution is executed by the seiz process comes too late.

The first case in the order crown, is that of *Stringefellow* v as it has been already stated, to go through again. The san in *Roll. Abr.* 528. tit. *Prerogati* seems to have been expressed priety of the decision; but, a don't think it trenches on the my opinion, because that was an staple, under which the goods to be seized into the hands of t is done, and so returned by called a *liberate*, issues, comm liver them to the creditor to hc fied his demand. The property out of the debtor till the *liberate* be considered as executed till And in *Blayne's* case (*b*), wher ther a lessee was liable for rent of a writ of *extendi facias* and a before the *liberate* awarded *nih* of *extendi facias* is but of form into the queen's hands, for it were seized upon that writ. relied upon on the part of th Baron *Steel* says as the reason the crown, that the title of the

(*a*) *Dyer*, 67 *b*. (*b*) *Cro. Eli*

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'as executed. Whatever effect that
ıron *Steel* may have upon the statute
have none to support the doctrine of
ed for on the part of the crown, be-
of the subject was complete on the
on the *elegit*, the question of prero-
ıe. The case of *Smallcombe* v. *Cross*
has also been mentioned. That
f *fieri facias*, at the suit of different
to the sheriff on the same day, and
ıt the first, and therefore proves no-
nt of prerogative. And as to any
ether the execution was executed, it
ıat there was no seizure under the
eport in 5 *Mod.*, *Shower* says, in ar-
erogative, " that if the king's writ of
ter execution, yet the execution is
ı king's extent shall take up the
heriff had sold the goods by bill of
'ty is altered, and shall not be di-
s writ." This does not reach the
'ation; for he does not state at what
on the king's extent is supposed to
did bear upon the point, it is only
ısel. In Sir *Edward Cook*'s case (*b*)
ge says, in page 296., " If a writ
ıefore the execution is finished, the
'ed, as is to be seen in the case of
5 *M.*" But the question is, *when*
point of law finished; and as he
rom *Brownesoppe*'s case, his opinion
than that case. Chief Justice *Ho-*
f the same case says, " It is certain

1 *Salk.* (*b*) 2 *Roll's Rep.* 294.
in other

that

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that where a man is de
never lose his debt, but
him." This expression
vance the point contend
could have any doubt a
v. *Capel* (*a*) was a quest
assignees of a bankrupt
case it is said, "Extent
been made upon goods
fieri facias, and in the s
ing before bill of sale
altered." As far as th
for the crown; but it
ment came to be intro
argued the case as co
his argument, he says
by which I understan
counsel for the crown.
is cited, and then, at th
above mentioned is add
sume was added by th
of illustration; and if
counsel. *The King* v.
in favour of the crown;
tress for rent, which
before the extent came
between a distress an
Parker, in page 121. s
a general nor a special
the cattle or the things
trover or trespass, for t
by the act of the distra
party distrained upon.
a sheriff may maintain

(*a*) 2 *Show.* 480.

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ıst a wrong doer, because he is
value, yet goods so taken in
; unsold, are liable to seizure
ɔpinion of Chief Baron *Parker*
; and though it was not upon
yet it is illustrative of it, and
great attention. *The King* v.
the crown, if it can be relied
tion whether the sheriff should
ɹpon an order being made, it
at the sheriff wanted. At the
s a N. B. "it was taken for
: goods were levied by virtue
days before the *teste* of the
vas no bar to the crown: but
ı sold, for then execution had
last reason be the only one that
t it cannot be supported, as I
executed by the seizure under
; is said in Chief Baron *Gil-*
Exchequer, p. 89. may also be
s says, "But goods were bound
ıe *teste* of the writ, whether it
facias, because otherwise the
f the chattels might disappoint
ɔrds; who having, by their pro-
ɔods, there arose a lien on those
ıe *levari* was taken out; and the
not be less than the right of the
bound the goods from the *teste*
was found inconvenient, and,
c. 3. no execution shall bind the
from the time of the delivery of
: but this act seems not to ex-

Bunbury, 8.

tend

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tend to the king, for an extent of a later *teste* super
an execution of the goods by a former writ, becau
the king's prerogative at common law,
an execution at the subject's suit, a
extent, the execution was superseded ti
executed, because the public ought t
the private property; and the rather
is supposed by public business not to
care of every private affair relating
and therefore no time occurs to the
was to be prevented from his execu
person coming in before him, laches
to him, which the law does not allo
king's debt is preferred in the execut
executor is obliged by the law to pa
on record before a debt on recor
Where the Chief Baron is, as above
king's prerogative as to priority of e
not appear what particular circumstar
ject's execution he alludes to. He a
to point out instances where the king'
preferred where the subject's executi
the same time; but they appear to app
subject's execution on a statute staple
doubt can be entertained but that it is
the *liberate*. The expression of Lord
inception of an execution shall bar th
relied upon for the crown; but the qu
an inception of an execution, and w
cution has not gone beyond an incepti
the execution is not executed.

These appear to be the principal a
crown as to the general extent of the
pendent of the statute *Hen.* 8. There
but the property is partially divested o
and up to the extent of enabling the sl

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a special property in the goods, and hanged; and the sheriff may maintain trover against persons who take thout lawful excuse, as appears by *Bash* (*a*), *Wilbraham* v. *Snow* (*b*), ted in *Clerk* v. *Withers*, to which I and in *The King* v. *Cotton* already s not vested in the creditor, though down in some cases, because the er the goods to the Plaintiff; he is the sum recovered by the judgis to be paid to the Plaintiff, and zure, has nothing to do with the espect, a *fieri facias* differs from heriff is to deliver goods as well as at a reasonable price. But I think ot wholly divested out of the Deseizure, because, if a second exee sale under the first, the sheriff which he could not do if the proof the debtor; and so, if upon a e sheriff has sold as much as will and he continues to go on to sell or may have an action of trover such sale, as appears by the case . (*c*) And, so also, the debtor naintain trover against the sheriff after the debtor has delivered him oney to be levied under the writ; . (*d*) The crown contends, that property which is divested out of general property remains in him, crown is to attach upon the whole if there had been no special pro-

(*c*) 8 *Taunt.* 527.
(*d*) 2 *Show.* 87.

perty

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perty divested. But I do think that the execution of greater effect upon the proj debtor, than the execution upon it.

It will be proper to see seizure, whether it constitut not, in case of other conflicti executions or commissions and I think that, generally and subject, the execution i of seizure, and as the exe cannot be stopped by any s is so in case of a writ of *supersedeas* from the time o of error. If it be allowed it operates as a *supersede* pletely settled in the case and Chief Justice *Willes* e the subject, which I shall ment. In *Cro. Eliz.* 597., t 40 *Eliz.* in the King's Benc was awarded, by virtue whe fendant's goods, and before into the exchequer chamber *sedeas* awarded. The sheri goods, and that they remai *emptorum*: a restitution was was holden *per totam curia* begun the execution regula far as he had gone, and a ve to perfect it. It is there sai of Sir *Miles Corbert* v. *Rook* record was removed by a writ

(*a*) *Wil*

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the same purpose. In
the sheriff take goods in
em in his hands not sold,
the sheriff, yet he shall
ll proceed to the sale of
the execution was before
e execution being entire,
k v. *Honyman* (*a*), a writ
sheriff after a *fi. fa.*; he
oods which he has levied
levy no more: *per totam*
r v. *Bulstrode* (*b*) it was
error, the sheriff returns
, the execution is not to
f *Clerk* v. *Withers* (*c*), it
e entire thing, and is not
egun. The only case to
491., where it was said,
efore the sale, the goods
it is said there), the pro-
eizure, which reason not
e *Willes* says, I give no
the determinations above
tion is considered as exe-
fieri facias; and though
e sheriffs from executing
ay, nevertheless, proceed

s, in which it appears to
tion is complete by the
Lechmere v. *Thorough-*
London (*d*), was an action
f a bankrupt for taking
rdict it was stated, that

(*c*) 1 *Salk.* 322, 323.
(*d*) 3 *Mod.* 236.

one

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one *Toplady*, on 28th of *April*, became ban
against whom a judgment was formerly obtained.
judgment creditor sued out a *fi. fa.*, and the s
on the 29th of *April*, seized the goods of *To*
After the seizure, and before any *venditioni ex*
that is, on the 4th of *May*, an extent issued a
two persons who were indebted to the king, a
inquisition *Toplady* was found indebted to them, v
upon parcel of the goods were seized by the s
upon the extent and sold; but before the sa
any execution of the Exchequer process, a comm
of bankrupt issued against *Toplady*, and the co
sioners, on the 2d of *June*, assigned the goods
plaintiff. The question was, whether the extent c
come too late, and it was held it did; or, wheth
fi. fa. was well executed, so that the assignees
bankrupt's estate could have a title to those
which were taken before in execution, and so in *c*
legis; and it was held they had no title. The
case is reported in 1 *Shower*, 12.; and it is said
note in *Shower*, that it was decided entirely with
ence to the liability of the officers. It is also re
in *Comberbach*, 123., and Lord *Holt* there says,
the property of the goods is vested by the deliv
the *fieri facias*, and the extent afterwards for th
comes too late, and that, on the statute of fraud
perjuries." The reason given is not a correct on
is most likely a mistake of the reporter; and takin
consideration the whole of the various reports o
case of *Lechmere* v. *Thoroughgood*, I do not conside
having decided this precise point, but only as sh
a general opinion of the Judges of that day, th
extent of the crown should not be preferred to t
the subject in a case like the present. *Clerk* v. *W*
though it does not relate to an extent, yet it sh
what light the seizure under a *fi. fa.* is considered

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nereby in effect considered to be
ed also in 6 *Mod.* 290.; 2 *Lord*
k. 322. This was a writ of error
ommon Pleas upon a *scire facias*
defendant, sheriff of *Middlesex.*
e, that one *Dives*, as administra-
ed a judgment for 304*l.* against
fi. fa. directed to the defendant,
d upon that writ the defendant
eized goods to the value of the
nained in his hands for want of
ıd before the goods were sold,
ıued out this *scire facias* to the
ı why the goods should not be
posing that now that *Dives* was
could have the fruits of the exe-
ırrer to this writ, judgment was
t in the Common Pleas. The
t the death of a party, who has
ıfter the seizure of goods, but
will not abate the execution, or
. whom the execution was sued
Lord Raymond Lord *Holt* says,
ɔods there is nothing to be done
ıg the money into court." And
, "the substantial part of the
ın the lifetime of the executor,
ıted to complete it but the formal
the sheriff seizes the goods by
i facias, he gains a special pro-
y maintain trespass against the
ım away." So it is said in *Cro.*
ıtain trover against a stranger
Wilbraham v. *Snowe.* (*a*) Mr.

ıd. 47. 1 *Lev.* 282.

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Justice *Powell* says, " An execution is an entire and that sheriff that takes the goods in executio go on and sell, though he is out of his office, a the now sheriff." And in the report in 6 *Mo* Justice *Powis* says, that the selling is but the part of the execution. In the judgment of the C *Salkeld* it is said, " An execution is an entire thi cannot be superseded after it has begun."

I shall now state in what cases the executi been considered as executed, arising upon quest the construction and operation of the bankrupt la 21 *Jac.* 1. *c.* 19. *s.* 9. it is enacted, that " all and creditor and creditors having security for their debts by judgment, statute, recognizance, specia other security, or having made attachments goods and chattels of the bankrupt, whereof th no execution or extent served and executed up of the lands, tenements, hereditaments, goods, ch and other estate of the bankrupt before such t he shall become bankrupt, shall not be relieve any such judgment, statute, &c. for any more rateable part of their just and due debts wi other creditors of the bankrupt, without respect such penalty or greater sum contained in such ment, statute, &c., or other security." Upon th tute it has been determined that where a c has obtained a judgment, and sued out a *fieri* and a seizure has been made under it, if befo an act of bankruptcy intervenes, the judgment-c shall not be obliged to come in under the comm but the sheriff may proceed to sell the goods. The of the act being, " whereof there is no executi extent served or executed," it might be contende the execution under which the sheriff has seize not sold, is not an execution executed, because has been no sale; but the determinations upo

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pon as goods have been
at is considered in law as
nd the sale is but a formal
ocess, and has, therefore,
n respect of the alteration
cannot be necessary to
sition, because the con-
in disputes between the
judgment-creditor, is to
kruptcy or the seizure of
and to consider the exe-
ire under the *fieri facias*.
uite clear that in all cases
e execution is considered
of the goods under a *fieri*
estion is, whether under
same rule is to hold as
There is no doubt but
be preferred, all things
The crown has a prefer-
id from the *teste* of the
which the subject has
sted before the seizure
t will prevail; but there
le why if a rule be per-
een subject and subject,
l by the seizure under
d not be applied in all
oncerned. There is no
ning in the debtor, upon
y attach, the extent may
herefore follow that it is
do away with the exe-
And it should seem that
that portion of the pro-
or, in the same way as the

second

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second execution of a private creditor does. case of a pledge of goods by the owner, the extent can only take the goods subject to the pl is admitted by Chief Baron *Parker* in the *The Cotton*, p. 118. So also, in *The King* v. *Lee* (*a*) held that if a factor has a lien upon goods in re acceptances, it was held that the crown could o the goods subject to the claim of the factor. according to the case of *Casberd and Another and Others* (*b*), a deposit of title-deeds by a sim tract debtor of the crown is an equitable mortg binds the crown. So, a wharfinger has a lien the crown for his general balance. And if by th upon the property by the contract of the pa crown only takes it subject to the charge, t reason ought to apply where a creditor has ob claim upon the property by the process of the l

I shall now consider what effect the 33 *Hen.* has upon the case. By the fiftieth section of bonds to the king are put upon the same fo statutes staple; and in the fifty-second and f sections, up to and including the fifty-seven visions are made for the course of proceed the king's debts. A further provision is mad seventy-third section; and then comes the fourth, upon which the question arises, — " any suit be commenced or taken, or any pr hereafter awarded for the king for the reco any of the king's debts, then the same suit cess shall be preferred before the suit of any or persons, and our said sovereign lord, his h successors, shall have first execution against fendant or defendants of and for his said deb any other person or persons, so always that th

(*a*) 6 *Price*, 269. (*b*) 6 *Price*, 4 m.

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ommenced, or process awarded
suit of our said sovereign lord
ccessors, before judgment given
son or persons." And in my
award or process for the king's
t was obtained for the private
ie goods were seized under the
n at the suit of those creditors
extent. In construing acts of
ule to follow the very words of
an interpretation be not recon-
lauses, or be contrary to the
:t, or be inconsistent with some
law, which it may be supposed
interfere with. But general
his right of the creditors falling
ment. It is said, first, that this
not a taking or commencing a
s. It is certainly not taking or
I think it is awarding process.
l so constantly called. It com-
s the body of the debtor, and so
cution is complete. It is true
not complete till a *venditioni*
s part of the command of the
e not to be sold till a writ of
o, in the case of a subject, the
staple is not complete till a
n, when the writ of *liberate* is
on to the writ of extent, and
xtent, as is said by the court in
But I cannot doubt that a writ
not only immediate extents in
n aid; — and as soon as a debt

Cro. Car. 148.

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from a third person to the king's
inquisition and recorded, it falls w
56th sections of 33 *Hen.* 8., and a
there mentioned, may be awarded.
of proceeding upon a record debt
ther it be originally of record, o
originally of record, but recorded
a commission, is by *scire facias*, wh
in danger of being lost; and in th
facias is the ultimate process of ex
debt be in danger of being lost, t
issue in the first instance. But no
instance, either against the imme
crown, or against persons indebted
ever issues, unless there be an affida
in danger. In *The King* v. *Pears*
Thomson says, "In the case of an e
the insolvency of the debtor is made
be done the *scire facias* is the
crown has not an election, excep
vency. And the rule in the Exchequ
requires that he who desires any
by inquisition in his aid, shall
other things, that the debtor is m
trade, as that unless a speedy cou
him, the debt is in great danger to
make no difference as to the na
whether it issue upon a judgment
facias, or whether it issue in the
proceeding by extent in the first i
in the fifty-fifth section of the st
one way of proceeding by the vario
tioned, and amongst others by *exten*
require; and, in this very record,

(*a*) 6 *Price*, 292.

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of the statute made for the re-
ir lord the king; as is the com-
t think it material, whether the
tness an execution or not; for,
as for the recovery of the king's
the statute mentions; for it is
hich, in the usual course of the
ll eventually be paid. It is said,
n applies only to land, and not
g in the clause so to restrict it.
speaks of execution upon the
f the party, and there seems no
he seventy-fourth section should
peration.

the seventy-fourth section ap-
nts in aid, and also to goods,
hether it increases or abridges
crown, and in what degree.
as held in Sir *Thomas Cecil's*
; given a benefit and advantage
naking every bond made to the
statute staple. Secondly, in
ig himself for obligations made
Thirdly, to recover costs and
suing of executions for all his
king shall be preferred in his
n persons. Sixthly, in charg-
id the heir who hath the land
tor. And, therefore, it was the
atify the subject, that where a
e for the levying of the king's
y and beneficial manner than
the subject also should have
ad not before. And it may be
he new benefits was to give the

7 *Rep.* 93 *b.*

subject

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subject a preference in cases wh
obtained before the extent of the
King v. *Andrew* (*a*), Mr. Baron *P*
has many prerogatives, *pro bono p*
in question, the statute 33 *Hen*
rogative and controls the comm
statutes do not alter the comm
statutes do, and here is a negativ
Baron *Nicholls* says, "Before the
king was not bound, but the stat
ation though it sounds in the af
a new thing and *ita quod*, wh
tion precedent and a limitation
fore, opinions expressed in dif
general effect of the statute in
prerogative. And *The King* v.
firmation of this doctrine as to
tute of *Henry* 8. *A.* was indebte
and by bonds to *C.* and *D.*, and
E., and died. *E.* being a debtor
debt due to him to be seized into
upon this a *scire facias* issued a
cutor of *A.*, and before the retur
bond creditors, obtained judgmer
pleaded to the *scire facias* the first
sequent judgments. The Attorn
The Court held, that the king's
red before the subsequent judgme
but a precedent judgment shoul
it, upon the words of the statu
Chief Baron *Comyns*, in his *Diges*
"By the statute 33 *Hen.* 8. *c.* 3
the king's debt shall be preferre
so always as that the king's suit

(*a*) *Hardr. Rep.* 27. (

ed before judgment for the said other per-
d in the next *placitum* he says, "and there-
cution be upon a judgment against the king's
before a *venditioni exponas*, an extent comes
s suit, the goods cannot be taken upon the
And he refers to 3 *Mod.* 236. and *Hardres*, 27.
of these cases is *Lechmere* v. *Thoroughgood*,
er is *The King* v. *Andrew*, upon which I have
narked, and I only quote this passage from
igest to shew, in a general way, in what light
ed the statutes of 33 *Hen.* 8. The meaning
nty-fourth section seems to me to be, that if
proceeds to execution it shall have the first
but in order to be entitled to that privilege,
st be commenced, or process be awarded at
the king before judgment obtained by the
nd that unless it be so, the crown shall
ch priority. By the first execution I under-
prerogative privilege of execution, whatever
ge may be, and of which the crown may avail
e be process from the crown before judgment
ditor. But if the process be not awarded
judgment be obtained, then the crown stands
light than a common creditor. The cases of
utler, and *The Attorney-General* v. *Aldersey*,
(*a*), may be mentioned as in favour of the
he construction of the statute of *Henry* 8.;
ne only question was, whether a penalty con-
debt, which the Courts held it did; but in
cases the proceedings on the part of the
commenced before the judgments were given
ject, and therefore they could not avail them-
e provisions of the statute.
e best consideration I have been able to give

(*a*) 1 *East*, 338.

to

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to this case, I think that this writ of extent should
be executed by the sheriff by extending and seizing
goods into the king's hands, and selling them to sat
the king's debt; and I think it makes no differe
whether the extent be in chief or in aid.

BAYLEY B. The question proposed for the c
sideration of the judges is in substance this: — W
ther, if the sheriff has seized the goods of a del
under a *fieri facias*, and those goods remain unsold
the sheriff's hands, they are liable to an extent of
crown tested after such seizure, and may be seized
sold to satisfy the crown's debt, without regard to
writ of *fieri facias*; and I am of opinion that they
so liable.

The writ of extent directs the sheriff to enq
what goods and chattels the king's debtor, against wh
it issued, had in his bailiwick at the time it issued,
to take and seize the same into his hands, there to
main until the king's debt be satisfied. The ques
then is, whether, by the seizure under a *fieri facias*,
goods so seized cease, as against the crown, to any
what extent, to be the goods and chattels of the deb
or whether the crown is not entitled to treat them
the goods and chattels of the debtor, to all intents
purposes, and to the same extent as if there had b
no seizure under the *fieri facias*.

The command to the sheriff, by a writ of *fieri fa*
is, that of the goods and chattels of the defendan
cause to be made the sum for which judgment is gi
Till money is made the execution is in progress o
The seizure of goods is only in order that money
be made. The goods are still the debtor's goods.
he satisfies the execution, it is matter of right that
shall be returned to him: he has no occasion for a
of sale from the sheriff: he is entitled to them upon

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his original ownership. If the act of God
em, he has no remedy. That the crown is
consider lands and goods as continuing the
oods of the king's debtor, notwithstanding a
eof into the king's hands upon an *extendi*
f Chancery upon a statute staple, is clear
efellow's case, which has been cited; and the
of that right may be collected from the
e writ; that is, the prerogative of the crown
paid and served by its debtors; and if the
is to prevail against a seizure into the king's
an *extendi facias*, why is it not to prevail
izure into the hands of the sheriff, who is
inister, upon a *fieri facias?* Can any satis-
on be given for a distinction? The found-
king's right, in the one case, is, that the
nains in the original owner till *liberate*; and
l it remains, as against the crown, in the
e original proprietor, till the things are sold.
own is entitled to consider property as con-
elong to the king's debtor, notwithstanding a
of bankruptcy, which has been called a sta-
ecution, until a conveyance is made thereof
commission, is established by *Rex* v. *Han-*
3, and *Rex* v. *Capel*, in 1686 (*a*); and *Brassey*
b), in 1733: and that it is equally entitled,
ding a seizure upon a distress for rent, is
anted in *Rex* v. *Dale* (*c*), in the year 1719;
lemnly adjudged in *Rex* v. *Cotton* (*d*), in
I forbear stating these cases at length to
notwithstanding the strong analogy they
case supposed in your Lordships' question,
ey have been already stated, and because
ies directly upon the point are so numerous

Show. 481.
range, 978.
(*c*) *Bunbury*, 42.
(*d*) *Parker*, 112.

and

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and strong. The first authority I am point is the *dictum* of Mr. Justice *Do ward Cook's* case. (*a*) He lays down a writ come from the king before the subject be finished, the king shall be pr seen in *Brownesopp's* case, and in *St* and though there be sufficient for you you must wait till the king is satisfied; not enough for both, you must suffer loss, for when the public and private in the balance of justice, the public the private, because the public is be vate." In the *Attorney-General* v. *C* chequer (*b*), *Shower* says, "Extents good that have been made upon goo by virtue of a *fieri facias*, and in the the extent coming before a bill of sale property was not altered." In *Small ham* (*c*), where the question was, which writs of *fieri facias* should have the been said, *arguendo*, that if the king's sale by the sheriff under a *fieri facia* be seized again for the king: *Shower* right: "If the king's writ of extent execution, yet the execution is sup king's extent shall take up the goods; had sold the goods by bill of sale, altered, and shall not be divested by In *Rex* v. *Peck* (*d*), 1716, the sheriff s *facias* from C. B. in *April*; but be extent was delivered to the sheriff, teste motion was made to amend his retu *Bunbury* makes this note: "*N. B.*

(*a*) 2 *Roll.* 295.
(*b*) 2 *Show.* 481.
(*c*) 5 *M*
(*d*) *Bun*

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.he goods were levied by *fieri* the *teste* of the extent, yet that own; but, *quære*, had they been n had been executed." At no , viz. 9th of *June* 1722, *Gilbert* d on the 1st of *June* 1725, Chief e upon the Court of Exchequer ; opinion upon this point. He that the king's prerogative could ght of the subject, and that the f the subject bound his debtor's of the writ. This, he says, was nd occasioned the provision in cution should bind the property lelivery of the writ to the sheriff. ntinues, "seems not to extend to it of a later *teste* supersedes an by a former writ, because by the mmon law if there had been an 's suit, and afterwards an extent, erseded till the extent was exe- olic ought to be preferred to the the rather because the king is iness not to be able to take care lating to his revenue; and, there- o (*i. e.* hinders or obstructs) the be prevented from his execution ng in before him, laches must be the law does not allow." Here, e deliberate opinion of a man of rch upon a point it was peculiarly relative to what was the course own Court, and likely to be of nd he speaks of it without the , and gives what has the ap- tory reason for the prerogative priority.

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priority. In a few lines aft
where the subject has a sta
prior to the debt of the kir
lands before any seizure by
the question, what shall be
extent by the crown: and he
that if the subject has the
by a liberate before the exten
ject shall hold the land discha
but if the king's extent com
liberate, the king's debt sh
subject wait till the king's d
Cotton, in the able and elab
Baron *Parker* there delivers,
fellow's case as good law, an
distinction in those cases, wh
in or is divested out of the ki
the point now under consi
execution and remaining ur
upon an extent."

I now come, chronologic
v. *Sumner* in the Common Pl
v. *Dayrell* eighteen years
King's Bench. They are t
be law, the judgment in thi
the crown. I am of opinio
Uppom v. *Sumner* first ca
counsel for the execution c
clared he could not suppor
He afterwards desired to arg
it had never before been put
said (with what truth the a
mentioning will shew), it h
that an extent was to be
Serjt. *Grose*, on the other sic
brought under the notice of

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but contented himself with
l the dictum it contained,
n which I can find nothing
at: the Court took time to
for the execution creditor,
t upon 33 *H.* 8. *c.* 39. *s.* 74.,
chmere v. *Thoroughgood* (*b*),
rew (*c*), and *Rex* v. *Dickin-*
consider by and bye. In
for the execution creditor
e statute 33 *Hen.* 8. *c.* 39.
ttorney-General v. *Andrew*,
Uppom v. *Sumner*, and the
The counsel for the crown
ities not noticed in *Uppom*
; *Doddridge's dictum* in Sir
ictum in *Petit* v. *Benson*,
Shower, 481., and the de-
cannot be said, therefore,
es were brought before the
Lord *Kenyon* lays it down,
in goods remains in the
l one execution at the suit
the suit of the subject, are
vail." But he proceeded
admitted to be erroneous,)
it to the sheriff the pro-
and altered so that there
e debtor upon which the
. The other three Judges
33 *Hen.* 8., and upon *Up-*
tice or discuss any of the
n. After these two deci-

(*c*) *Hardr.* 23. 2 *Comyns' Digest*, 538.
(*d*) *Parker*, 262.

sions,

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sions, the point came ag
v. *Peckham* (or *Rex* v. *W*
quer in 1805; and afte
authorities, the Court a
in the earlier cases, and
v. *Sumner*, and *Rorke* v.
3 *Wms. Saund.* 70. *e.*; a
M'Donald's judgment a
This decision was adhe
Allen (*a*), in the Exchequ

This being the state o
point, I shall not trespas
the House, except to sh
in *Uppom* v. *Sumner* (wit
in *Comyns*) will not supp
as my opinion that the
only to cases in which
plete before the crown
where it was in progr
General v. *Andrew* (*b*) it
consideration of the repo
plete before the *teste* o
land was not in the kir
case, but in *Andrew*, the
of proceeding implies i
Andrew had taken the
the subject's title was pri
and he and the other ju
Stringefellow's case, as t
the crown, unless the la
the execution creditor,
completed: but for that
have been an authority
General v. *Andrew*, ther

(*a*) 6 *Price*, 114.

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tion; viz., the right of the execution; an execution not perfected. *Lechmere* ass by the assignees of a of *London* for seizing the and before the commis- er a *fi. fa.*, on the 29th of y an extent issued. The etween the execution cre- :tween the assignees and or the extent were good an answer to the action. rt, therefore, was wholly may be appreciated by o have fallen from Lord f the goods is vested by d the extent afterwards, nd that, on the statute of of frauds does not, in this ır beyond all doubt; and a he grounds of decision in diminishes the authority *ickenson* (*b*) was a case not s, but between the claim ' a simple contract debt :laim of a judgment cre- he other. The testator) *A.*, and by simple con- ısed the debt to him to ; and upon a *scire facias* uestion was, whether the l to the simple contract d the opinion was that it ıe statute 33 *Hen.* 8. "so

(*b*) *Parker*, 262.

always

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always that the king'
menced, or process aw
judgment given for t
bears upon the quest
flicting executions, I
case; in 1692; Lor
begin in 1743.

This brings me to
The provision in th
be commenced or tal
awarded for the kin
king's debts, that t
shall be preferred bef
sons; and that our s
successors, shall have
fendant or defendants
any other person or
king's suit be taken an
for the said debt at th
cessors, before judgm
or persons." To forr
to be put upon this pr
the law stood when
mon law the king
he could not be sue
creditor might sue his
protection, as far as
would undertake for
out execution; but wi
cution of the judgme
gree were made to the
then in 33 *Hen.* 8. *c.*
narrow the prerogative
might be restrained fro
debt was agreed for,
debt or not, that from

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ıut execution should be
ch the king was suing or
lebt, but that that right
f the king was suing or
ınstruction appears to me
clause, and is consistent
ɔon the point in question,
ımon law prerogative of
hilst it is in progress.
ɔonsidering that the pro-
nerely by a seizure under
33 *H.* 8. *c.* 39. *s.* 74. does
cting executions between
re the crown's extent is
ı the hands of the sheriff
of a subject; considering
stice *Treby*'s note in *Dyer*,
ɔed as having been acted
idering that *Doddridge* J.
ac. 1. (1624), and that it
ıd 1697, in the *Attorney-*
lcombe v. *Buckingham* (*b*);
ıpon the point, reported
ord Chief Baron *Gilbert*
sputable in his Exchequer
Baron *Parker* considers
dgment in *Rex* v. *Cotton*,
olemnly decided in *Rex* v.
Allnutt, and acted upon
considering that 33 *H.* 8.
ng upon the point until
wn to be inapplicable by
the analogy furnished by
. *Dale* and *Rex* v. *Cotton*,

(*b*) 5 *Mod.* 376.

in

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in cases of distress, *Capel*, and the *Attorney* v. *Dawson*, in cases of that if the sheriff seizes suit of a subject, and main in his hands, a crown, those goods Upon the second questi whether the writ of ext of opinion it does not. was an extent in aid.

TINDAL C. J. The ships have been so o Judges who have pr opinions, that it is al them. I shall conten that upon the first qu ships, I agree in op Judges, that the exten the sheriff after the *fi. fa.*, but before the s be first executed by th writ of *fi. fa.*

It appears to me, m depends upon the dete points only. First, W debtor is *altered* by the *fi. fa.* And, secondly, main unaltered, Whet to the present case, by statute was the undis namely, the preference of the crown comes in ject: for if the propert *fa.* remains still in the

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subject's writ is *begun only*, e of the issuing the crown then in conflict and com- goods of the subject are then writ of extent, which calls and seize into the king's chattels which the defendant e of the *teste* and issuing of king's debt," unless indeed interposed a restriction ap-

of these two points does in he present enquiry, appears o direct authorities for the execution are grounded on case of *Uppom* v. *Sumner*, the statute of *Hen.* 8., and *ll* being decided by Lord f the property in the goods, es, on the authority of the and upon the first of these t the property in the goods ot in any manner *altered* by ll continues in the debtor, ereof by the sheriff's sale

If the property is changed nsferred either to the judg- riff; but there are no words r. The sheriff is directed se to be made of the goods nt the debt or damages re- this respect the language that of the *elegit*, by which the plaintiff all the chat- oiety of the land, until the indeed, is the property in

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the goods from bei
suit, that the she
plaintiff in satisfac
Again, if the defe
his goods under t
he retains his goo
cution, and any fu
the sheriff only. C
the goods had be
the plaintiff himse
actual pledge or se
is difficult to see
should hold his g
before actual payn
plaintiff. Again, i
writ, but before sal
means without the
either upon the pla
the debtor, on wh
made; *Hob. Rep.* 6
had been altered b
fall upon that party
as, undoubtedly aft
the purchaser?. A
two writs of *fi. fa.*,
to him, although h
who delivered the
is bound by the s
party cannot sell t
delivered: *Smallcom*
perty was altered by
sheriff, upon what
second convey the
of *Hutchinson* v. *Jol*

(*a*) *Cro. Eliz.* 504.

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the sheriff *seizes* under the
it before sale discovers that
ered to him at an earlier
writ first delivered, and
ntiff in the earlier writ, he
ugh if he had sold under
have done so. These two
at it is the sale, not the
roperty. It has, however,
the common law by which
bound by the award of the
s it has since been, by the
ecome bound only by the
sheriff, implies that the
he debtor by such delivery
ng of those words has been
rious decisions. It will be
Payne v. *Drewe* (*a*), in which
idered, and in which Lord
n the rule to be, that "the
ery of the writ to the sheriff
and all claiming by assign-
through or under him." In
t, therefore, may the goods
r the delivery of the writ to
quence contended for, that
is in any manner altered
en contended, that as the
ction of trespass or trover
taking goods which he has
that he, and not the de-
n the goods so seized. But
sufficient to answer, that
legal possession of goods,

(*a*) 5 523.

though

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though not the prop
against a wrongdoer;
pute the title of the
the goods with any co
no doubt, has the leg
goods; after seizure h
for that purpose, for
and make sale thereof.
that the absolute prop
divested from the defe
maintainable by the fi
who wrongfully takes
of goods for hire; or
trespasser; and yet
absolute property is no
in the true owner.

But it is argued at
the main ground of ar
such special property,
goods of the debtor
just as goods in pawn
pledge; and lands mor
to the claims, both le
gagee. In those cas
actually been *altered* b
under an express con
the other party for the
party. It is a contr
before the seizure un
of the property which
As, therefore, the cro
property actually parte
it seize property so pa
rights of the partial pu
consideration, no prop
crown debtor, under

1832.

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fore sale; and the reason of that proposition was, operty remains in the de-

But in later cases, the r exercise of discretion to nder the writ and brought : of the writ of error. In , the suing of the writ of dant himself, and the ob- f of the fruits of his exe- of the defendant himself writ of error before the make a manifest distinc- that of persons who claim

erty seized under the writ ct forms the dividing line, plete before the awarding operty is protected there- npleted, the property may rs from *Fleetwood's* case, ging to the crown debtor, before the award of exe- ch is analogous to the *teste* d to be good against the ld not take it in execution.

In this case no argument rs the property: the whole of the Court rests on the ndependently of any argu- long series of cases, from present, with the excep- which have been so often *ner*, and *Rorke* v. *Dayrell*,

in margin.

establish

1832.

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establish the positi
debtor's property, e
distress, or any oth
the satisfaction of
issues at the suit of
in specie, and befor
ownership, it is part
treat this seizure as
satisfaction of the cro
The first authority is
more valuable becaus
years after the passi
time consequently wh
statute, and the mea
been familiar to all th
decision. In that ca
chequer and two of t
of the justices of the
the justices of the C
that the actual taking
debtor, by the sheriff
Chancery upon a stat
into the hands of the
to the Plaintiff, was
at the suit of the cr
that the sheriff was bo
the king's debt. And
porter for the opinion
property in the goods a
before they were delive
has been said, howeve
dered as subject to doul
joined to it by the repor
on the other hand, th
Abridgment (*a*) without

(*a*) 2.

1832.

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ecute the extent for the
ty of the goods and lands
. they were delivered to
l therefore liable to the
Iobart, in *Sheffield* v. *Rad-*
w. Again, *Treby*, Chief
he report, states, that the
e that this case is law;
relied upon as law in the
Chief Baron, in the very
upon that case, states,
w's case to be undoubt-
er instances in which he
entions that Lord *Hard-*
delivering the resolution
h in *Brassey* v. *Dawson*,
lied upon *Stringefellow's*
was grounded on the ge-
ed by law to the king's

o, of *The King* v. *Cotton*,
s determined on the very
to the present case. In
s, the king's debtor, were
nt on the 12th of *October*.
he seizure, but before the
Court of Exchequer held,
s was not altered by the
ctual sale remained in the
to the operation of the
real distinction be made
the goods for the purpose
equent sale, and a sheriff
purpose of making the

(*b*) *Parker*, 112.

plaintiff's

1832.

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:he sale ought to be entitled to the
ut *Stringefellow's* case, acknowledged
rious and repeated instances, and by
'udges, is a direct authority on the
er discussion. And since that deci-
:ases have been decided in the same
: argument, by the Court of Exche-
icularly to *The King* v. *Wells and*
and to the case of *Rex* v. *Sloper and*
Exchequer acted on the authority of

ses which have received a contrary
before referred to, viz. *Uppon* v.
er term 1779, by the Court of Com-
lorke v. *Dayrell* (*d*), in 1793, by the
nch; cases undoubtedly entitled to
1 the authority of the eminent per-
y were adjudged is taken into con-
hese two cases only have received a
for I cannot consider the case of
ughgood and Another (*e*), which is
o be an authority upon the present
the crown and the subject. That
over by the assignees of a bankrupt
who had entered under a *fi. fa.*; and
lict, one of the questions was, whe-
s well executed, the sheriff having
sold under the writ before the com-
ipt had issued; and upon that ques-
hat the *fi. fa.* was well executed, so
of the bankrupt's estate could not
se goods which were before taken in
refore, *in custodiâ legis*. So far, un-

1 a note.

(*d*) 4 *T. R.* 402.
(*e*) 3 *Mod.* 236.

T doubtedly,

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GILES
v.
GROVES.

1832.

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of *Hen.* 8. By the
"that if any suit be
be hereafter awarded
y of the king's debts,
preferred before the
shall have first exe-
ıd for his said debts,
that the king's said
process awarded, for
ing before judgment

not to be interpreted
ıas been at all times
d give the subject a
ution at the suit of
nst that of any sub-
judgment before the
coording to the letter
rown's remedy under
, whereas the same
whatever against an
even though issued
r such judgment was
, the subject's judg-
though his execution
case of a subject, the
t be preferred. The
ıust therefore be de-
nce given up, we are
ars to be the nearest
the same time which
ınd intention of the
ould be considered,
ive of the crown was
In order that we may
ı of it was intended to

1832.

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of *Hen.* 8.
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extent

1832.

GILES v. GROVER.

extent then issues, a
before the sale it is to
entry and execution
the action, for his de
penses will be allowe
of the king's debt.
subject discovers, a ve
cannot be satisfied un

For these reasons,
upon the first quest
actual sale under th
between the right of
subject; and, conseq
present case to be pre
at the suit of the subj

Upon the second
ships I shall say no
to make no difference
in aid, or an immedia
all the authorities agr
tend to the one which

I have the authorit
avoidably absent on t
concurrence with the
his Majesty's Judges.

Lord TENTERDEN
between *Daniel Giles*,
Hertford, Plaintiff i
James Pollard, Defen
some time ago befo
Judges have given
that were proposed
answers a very gre
cided in that opinion
to your Lordships, t

being of a dif-

1882.

GILLS v. GROVER.

: An execution
he sheriff took
but before he
ill of sale to the
nt came at the
whether an ex-
rown, while the
f, is to be pre-
subject. The
proposed are of
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ormity with that
, and have long
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liberty of deli-
of the Court of

tion has arisen
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ien alluded to,
pom v. Sumner,
years ago, and
decided in the
n of the other
s in the Court
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those decisions,
ll by the Court
ecisions in the
those two prior

Barons of the
conversant with
peculiar duty to
attend

1831.

Giles v. Grover.

n in the hands of the sheriff. If the sheriff retain the process of the Court, and makes a bill of sale plaintiff in the action, then the judgment-creditor s the property; but until that is done, while the are in the possession of the sheriff they are in the dy of the law, but still remain the property of the r to whom they originally belonged. If the pro- were divested, some ceremony would be neces- to revest it; but there is no such ceremony. If debtor pays the money to the sheriff, the sheriff raws; he executes no conveyance; he does not go through any ceremony; but all he does is to draw and leave the goods where they were. It ars to me, therefore, that putting the case shortly that ground of a supposed divesting of the pro- , it can by no means sustain the two cases which I referred to, and which were decided against the of the crown.

remains to consider the effect of the statute upon h so much reliance was placed. That was the te passed in the reign of *Henry VIII.*, and upon first view of it, considering that statute by itself, without regard to the state of the law as it pre- ly existed, it might seem that the argument ed upon it was correct. By that statute it is ed, "That if any suit be commenced, or any pro- be hereafter awarded for the recovery of any of king's debts, the same suit and process shall be rred before the suit of any person or persons, the king, his heirs and successors shall have first ution against any defendant or defendants of and is said debts, before any other person or persons, ways that the king's suit be taken and commenced, rocess awarded for the said debt at the king's suit, e judgment given for the said other person or ons."

As

1832.

GILES v. GROVER.

ut in sus-
f his debt.
ing's debt,
over shall
lebt due to
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enables the
r, although
e could not
taking out
the crown.
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, the statute
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ve execution
gment given
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ng's debtor,
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effect of this
dgment, and
making satis-
ve the law in
all

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GILES v. GROVER.

all other res
execution c
the debtor, -
is, that they
though they
king's execu
been decide
Rorke v. *Do*
the Court o
the subject.
your Lords
very much
the decision
of enquiry
reported by
law, which
argued befo
tion, prelim
first occasio
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only the for
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there left u
though not
some of the
Lord *Ellenb*
Justice *Le*
the crown.
in reading t
collection of
of it, I am s
I formed th

The grou
pom v. *Sum*
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vesting it in

1832.

GILES v. GROVER.

pon the construction
a due consideration
w as it existed before,
a right of priority in
onsequently, that the
uer must be affirmed.
ing to the practice at
nce been altered, the
quer in this case was
gued before the Chief
f the Common Pleas,
d *Wynford* the other:
clusion upon that oc-
the judgment, under-
estion, which was one
ught to this house: I
rd *Wynford* upon the
n him that he is now
n which I have ven-
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ewing the cases, said,
inion, that the judg-
n this case is right, and
ffirmed. I entirely go
ced by the majority of
the questions put to
tance that this question
which way it shall be

Judgment affirmed.

1832.

MEMORAN

John Williams and *C. C. Pe*
signed their respective offices o
General to the Queen, were s
Mr. Serjeant *Taddy* and Mr. S

END OF TRINI

CASES

ARGUED AND DETERMINED 1832.

IN THE

# of COMMON PLEAS,

AND

OTHER COURTS,

IN

Michaelmas Term,

Third Year of the Reign of WILLIAM IV.

---

w *v.* ARDEN and Another, Two, &c. *Nov.* 3.

action for the recovery of 19*l.* 8*s.* 11*d.*, the dants, attorneys, pleaded a set-off of 21*l.* 13*s.* 6*d.* ess done for the plaintiff in the palace court, 3*l.* 10*s.* into court.

trial before *Tindal* C. J., the Plaintiff con- hat the business, in respect of which the De- claimed a set-off, ought never to have been d that the Defendants, therefore, were not en- nake any charge.

ransaction was as follows: — The Plaintiff had the Defendants, as his attornies, to sue one

In considering an attorney's bill, the jury may discard an item for work entirely useless, though upon an item for work partly useless, or in respect of which there has been any negligence, the client's remedy is only by a cross-action.

his son, in the pala
nissory note. The

e causes were on the
ame to the Plaintiff
pon which it was ag
:wo carts as a securi
ards the debt and c
g which, the Plainti
attornies, the De
10*s.* on *Wednesday*
roperty in my hand
g, which he has n
nem no more indul
e receipt of this lett
nd issued execution
ed a rule, calling
why the judgment
n signed contrary
n the part of *Sha*
ade absolute with c
ants to *Cooper*'s at
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gment, constituted

nief Justice direct
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:ndants in the exer
to the interest of
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having found a ve
:es,

erjt. now moved to
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ouching the utility
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1832.

SHAW v. ARDEN.

n by way of set-off ought to have been dealt same way as if the Defendants had brought recover the amount of their bill. To such llegations of negligence, or of want of skill t, would be no answer, but must form the ter of a cross action; *Templer* v. *M'Lach-* e Defendant in such an action may, perhaps, d to shew that the *whole* of the work done ; *Hill* v. *Featherstonhaugh* (*b*); but he can- the bill, admitting some of the items and hers, on the ground that he has derived from them. Charges must often be made hich ultimately turns out to be useless, but the time, the attorney may have entered exercise of a sound discretion, or honestly useful. And it is clear, that an attorney nly for gross negligence or gross want of ot for a mere error in judgment: it would him if he were responsible for the success ep in a cause. Nor is it necessary for the e client that he should be let into such a efence; for the officer of the Court, on tax- e bill, will strike out all charges for work im- dertaken. Here, after the Plaintiff's letter, for signing judgment, at least, was unexcep- hatever may be thought of the charge for se against the rule for setting judgment aside: *whole* of the Defendants' charges cannot be re- proper, and therefore the whole must stand.

C. J. The verdict in this cause having been sum under 20*l.*, the rules of the Court do not ew trial unless the Judge has misdirected the s received or rejected evidence improperly. on, therefore, now is, whether evidence was admitted, or the cause was improperly left to

(*b*) 7 *Bingh.* 569.

2 *N. R.* 136.

1832.

SHAW v. ARDEN.

the jury. The defence to th
more than the amount of the l
Plaintiff denied the validity of
there is no safer way of deter
considering it as if the Defen
for business done.

The Defendants were retain
the *Coopers*, father and son,
missory note. Two actions w
court, and judgment was abou
of compromise were offered, u
to be made, and costs paid
Coopers. The Defendants, h
as *Cooper* alleged, against goo
it aside on that ground was o
unsuccessfully. The claim
action was made up of the cha
for unsuccessfully opposing th
for the costs of that rule p
Would the Defendants have
these charges in an action on

This is not a case for consi
divisible or not, for the whol
relate to one transaction, an
more clearly established than
enforce a charge for doing bu
his employer. The question
this work was necessary for th
on from the Defendants over-z
business for their own advanta
the Plaintiff, appears from the
would not indeed be conclusive
undertaken, but that was a que
on which the evidence was con
therefore, there was nothing
the jury to consider, whether,
Defendants acted with the di

1832.

SHAW v. ARDEN.

terests, or whether it was altogether a useless That was the direction given to the jury, who verdict disallowed the set-off. Therefore, even erdict were wrong, the case falls within the rule rohibits a new trial for sums under 20*l.*

LEE J. The jury have come to a conclusion from that which I should have thought correct; jury having decided, upon a proper direction, falls within the general rule.

NQUET J. I abstain from entering into the facts, a rule for a new trial cannot be granted, unless y were misdirected, or evidence improperly re- or rejected. Here the case was properly left to y, and even admitting one of the charges to have stifiable, the jury had a right to discriminate the items, and reject charges for work useless Plaintiff.

ASON J. I am of the same opinion. The first is, whether the jury are authorized to dis- te between the items, and decide which con- charges for useful work, and which for useless. am of opinion they are so authorized. If, indeed, e item be for work, partly useful, the jury would luded from reducing that item, in an action to the amount of the bill, and the client must, in ase, resort to a cross action; but entire items ess work may be discarded by the jury. That ablished in *Hill* v. *Featherstonhaugh*, which is ess authority for dividing an attorney's bill.

next question is, whether this case was properly he jury? I have no doubt that it was; and if cannot enquire into the propriety of the verdict, ount recovered being under 20*l.*

Rule refused.

Nov. 7. WILLIAMSON and Another

To a plea of coverture the Plaintiff replied, that before the cause of action accrued, the defendant's husband became bankrupt, absconded without appearing to his commission, and continued to reside in foreign parts: Held, ill.

TO a plea of coverture the Plain
James Dawes, the husband of the
before the making of the several pro
takings in the declaration mentioned
afterwards, until the suing out of th
bankrupt thereinafter mentioned, was
man, and sought his trade of living by
ing. That afterwards, to wit, on th
1824, the said *J. Dawes* being indeb
Pool in the amount of 100*l.*, and mo
act of bankruptcy within the meanin
statutes then relating to bankrupts;
wit, on, &c. at, &c. a certain commissi
under the great seal, bearing date a
day and year last aforesaid, was d
issued against the said *J. Dawes* upo
the said *J. Pool*, a creditor then and
act of bankruptcy of the said *J. Dawes*
100*l.* and more, according to the for
statutes then in force concerning ban
virtue of the said commission, and by
several statutes, the said *J. Dawes* w
wit, on, &c. at, &c. in due form of l
clared bankrupt by the major part of
named in the said commission, withi
and meaning of the said several statut
bankruptcy committed before the date
of the said commission, to wit, at,
wards, to wit, on, &c. at, &c. due notic
said *J. Dawes*, and was also given an

1832.

WILLIAMSON v. DAWES.

Gazette, that such commission of bankruptcy
n and was awarded and issued forth against him
l *J. Dawes*, and that he had been declared a
ot thereon, and was required to surrender him-
he major part of the commissioners, in and by
commission named and authorized. That the
meetings were duly appointed for the said *J.*
surrendering himself and making a full dis-
and discovery of his estate and effects, and
his examination under the said commission
g to the form of the statutes in such case made
vided, and then in force, to wit, on the 6th and
rs of *November*, and on the 11th of *December* in
year 1824, and finally on the 29th day of
1825, until which last day the time for the
Dawes surrendering to the said commission had
ly enlarged, and notice thereof duly published
London Gazette, to wit, on the 7th of *December*
oresaid. But that the said *J. Dawes* after the
of the said commission, to wit, on the 8th of
1824, absconded and departed from and out
ingdom, and went and resided in parts beyond
to wit, in the kingdom of *France*; and that
aid *J. Dawes* never surrendered himself to the
rt of the said commissioners in and by the said
ion named and authorized, nor suffered himself
amined by them touching the disclosure and
of his estate and effects, although warned by
tion to surrender himself according to the form
tute in such case made and provided, and then
concerning bankrupts. Which said commission
in full force, to wit, at, &c. And the Plaintiffs
aid, that *J. Dawes* had always from the time of
sconding and departing from and out of this
as aforesaid, hitherto lived in exile in parts
the seas as aforesaid, and that during all the

1832.

WILLIAMSON v. DAWES.

e to the liabilities of a *feme sole*. [*Alderson* J. ication here does not contain any averment Defendant's promise was made while the hus- abroad.] That is involved in the allegation husband became bankrupt and absconded e promises, and the want of a more precise can only be objected to on special demurrer.

L C. J. The replication is bad in substance, tains no express averment that the Defendant's vas made during the absence of her husband, equivalent allegation; so that the question be raised cannot be determined on this record. lip of the pleader, however, we should allow to ed, if the ground-work of the Plaintiff's argu- e not entirely wanting. The principle estab- the case of *Marshall* v. *Rutton* is, that nothing ivil death of the husband, or something tanta- ill 'subject a wife to the liabilities of a *feme* looking at the facts of this case which cannot , the replication does not state such an involun- nce of the husband, as, within the principle decisions, can communicate to the wife the , or affect her with the liabilities, of a *feme sole*. no more than a temporary absconding.

EE J. I am of the same opinion. In the cases the wife has been held liable during her hus- sence abroad, the husband has either been a , or in a situation which precluded return. No ence appears in the present case; and if this n were held sufficient, the wife would be liable a husband absconds.

QUET J. I am of the same opinion. In the ansportation, it is the duty of the party to stay abroad;

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abroad; here, it was his duty to re husband is an *Englishman*. In *I* and *Walford* v. *Duchess de Pienne*, foreigner, which makes an essent case. If this absence were sufficien sidered a *feme sole* whenever a husb

ALDERSON J. Lord *Coke* explai calling abjuration a divorce betwee "*Sed opus est interprete*; for by l exiled or banished his country, whe *patriam*, but by authority of parli abjuration; and that must be up ceeding of law, as it was in this cas had before said, "An abjuration, t for ever into a foreign land, like our author speaketh here), is a c is the reason that a wife may b may be impleaded during the natu band. And so it is if by act of band be *attainted* of treason or fel life is banished for ever, as *Bellna* civil death, and the wife may sue as there is no more than a *charge* of fel

Judg

1832.

ON and Another *v.* LUPTON and WOOD. *Nov.* 13.

MPSIT for the price of corn sold and delivered he Plaintiffs to the Defendants. Plea, general At the trial before *Alderson* J. *York* Spring 832, a verdict was taken for the Plaintiffs for 5*d.*, subject to the opinion of the Court on the case:—

Plaintiffs were partners, trading at *Hamburgh* ne firm of Messrs. *John Fisher* and Co. The nt *Lupton* was an oil merchant at *Leeds*, and previous dealings in corn with the Plaintiffs. fendant *Wood* was a corn miller at *Headingley*, eds, and before the transaction of the 1st *De-*830, hereinafter mentioned, and out of which on arose, had not had any dealings with the

Defendants were never in partnership as general On the 1st *December* 1830, the Defendants order to *Slater*, the Plaintiffs' agent, which was into writing by the Defendant *Lupton* in the g terms:—"Ordered of the house of *John* nd Co., *Hambro'*, a small loading of wheat, say 00 quarters of the best red wheat, selected from t favoured districts, where it can be procured free from sprouts, the heaviest in weight, and in colour. As to the price, it is left to their n, minding to pay proper attention to our in-ooth in that as well as time of purchase; and to id purchase immediately, if it is imagined be-e present time and *Christmas* to be done the best.

Two persons, not partners, who concur in giving an order for one undivided parcel of goods, are not therefore liable jointly to the seller, if upon the whole of the transaction the intention of the parties appears to have been that the buyers should be severally responsible for the amount of their respective interests in the goods.

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best. Payment for the same t
us in the usual manner; supp
third part thereof to be drawn
other two thirds at the time
bill of lading."

Slater transmitted a copy o
tiffs, and in a letter from him
following remark, "Mr. *Wood*
Leeds, a very good man, and i
Tiedeman."

The Plaintiffs, in pursuance
a quantity of red wheat in gra
was to be shipped free on boar
and on the 11th of *January* 18
date addressed to "*Jonathan L*
Wood, *Headingley*, near *Leeds*,
things, they stated, "we have
joint account, of 756 quarters
the first one third of the price,
have this day drawn at three m

378*l.* Mr.
378*l.* Mr.

756*l.*

"And we hereby bind ourselv
delivery of this wheat." — "C
we will value on each of you
months date, for 378*l.*"

The Plaintiffs drew two bill
nuary, in conformity with this a

February 17. 1831, *Lupton*
Plaintiffs: — "Neighbour *Slater*
T. Wood of what you have do
wheat." — "I feel disposed to
make sales again of that wheat,

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of 67s. or 70s. per quarter. I have not alto-
e authority of my Co. in the business, but I
will approve of this measure."
ry 25. 1831, the Plaintiffs wrote an answer, ad-
s their letter of the 11th of *January*, to *Jona-*
ton, Leeds, and *Thomas Wood, Headingley*, near
issuading a resale of the wheat, and adding,
me, agreeable to the terms of the contract, we
in paid one third amount on account of the
and we this day took the liberty of valuing
reimbursement at three months, payable in

180*l.*
195*l.* } our order on *Jonathan Lupton*,

r order on *Thomas Wood*. And we hereby

r guaranty given on the 11th ult. that we hold
harmless for the advance up to the period of
d invoice."
laintiffs drew bills in conformity with this ad-
apprised *Lupton* by letter of *April* 26. 1831,
had despatched the wheat; at the same time
arded an invoice, and drew upon him one
xchange of the same date as the letter, for
5d. at three months, and a similar bill for
5d. on the Defendant *Wood*: this was for the
one third of the price of the wheat, and for
The letter was addressed like those which pre-
to *Lupton*, at *Leeds*, and *Wood*, at *Headingley*
ds; and the invoice stated the wheat to be
y order and on account of *Lupton, Leeds*, and
leadingley near *Leeds*. The wheat was duly
rom *Pillau* for *Goole*; the bill of lading was for-
rom *Pillau* to the Plaintiffs at *Hamburg*; and
was indorsed and forwarded to the Defendants
ter of the 26th of *April*, and on coming to the
possession

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possession of the Defendants, them. The wheat was delive discharge, and the freight a *Lupton* partly in cash and p *Wood*. It was afterwards sh its arrival was forthwith equ Defendants before it was ware on the 11th of *January* 1831 due, by each of the Defend of the wheat they began to and on the 3d of *May* 1831, Plaintiffs' agent, a sample, of the bad quality of the whe the Defendant *Lupton*, in co respecting the quality of the complaint to the Plaintiffs, i fendant *Wood* "the half own dressed a letter to *Slater* on t he said, "*J. L.* and *T. W.* m but they can only pay after b

Ultimately, the bills dat 1831 were accepted by eacl were dishonoured when due dispute as to the quality of Plaintiffs was then at *Leeds*, a as to the renewal of these bil count of the bad quality of th were ultimately accepted in li of *February* 25. 1831.

The two dishonoured bill drawn upon Defendant *Lupto* to him, in lieu of his renewe bills of the same date, drawn to him in like manner, upo bill for the amount of them.

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ceptance was regularly paid when due; but
ant *Wood*'s was dishonoured; and he became
n *July* 1831.
tion was brought to recover that part of the
remained unpaid, in consequence of *Wood*'s
being dishonoured. A deduction of 200*l.*
rice was agreed to on the trial of the cause,
n that the Defendant *Lupton* would under-
bring any action against the Plaintiffs for
of quality; and the question for the opinion
rt was, whether, at the commencement of the
Defendants were jointly liable for so much
e of the corn as then remained unpaid.

Serjt. for the Plaintiffs. The Defendants,
not general partners, having concurred in
order for an undivided parcel of wheat, are
ble to the Plaintiffs. *Waugh* v. *Carver*. (*a*)
might have been the arrangement between
, their contract, as it respects the Plaintiffs,
ontract, rendering each Defendant responsible
ole. The order is given by both; they speak
our interests;" the Plaintiffs in answer, say,
made a purchase on your *joint* account; and
lves to you for the regular delivery." *Lupton*,
r of *February* 17th, 1831, styles *Wood* his *Co.*;
iffs, in their letter of *February* 25., guarantee
the time of lading, and forward only one
d one bill of lading. If the Plaintiffs had
bserve their guaranty, the Defendants must
d in an action for damages: for the mere fact
t by separate bills will not render a contract
hich was in its inception joint. Thus, in

(*a*) 2 *H. Bl.* 235.

Anderson

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GIBSON v. LUPTON.

Anderson v. *Martindale* (
to and with *A.*, his execu
and to and with *B.*, and
to *A.*, his executors, &c.
covenant to *A.* and *B.*, i
interest, although the l
that therefore on the d
survived to *B.*, and *A.*'s
the covenant: and in *F*
A., having neither mone
if he would order with l
upon an adventure, if
them, *B.* should have ha
that such a contract co
third persons, though as
an agreement to pay for

Wilde Serjt., for the
taking the whole of this
it was manifestly the in
sides, that the contract b
several. By the terms o
were to be drawn on *eac*
tiffs' letters, the invoice
dressed to the Defenda
Leeds and *Headingley*; t
by each separately; and
drawn upon and accep
stances, taken together,
expressions which seeme
and the effect of the co
intention of the parties,
the whole of their condu

(*a*) 1 *East*, 497.

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having been heard in reply, the Court took
k into the correspondence, and judgment was
red by

C. J. There is no question in this case as
rtnership, *inter se*, between the Defendants;
e states expressly that there was no general
between them: and the further statement,
was to pay for his own moiety of this par-
go; that the freight and charges were paid by
of each; and that the cargo was, upon its
Leeds, equally divided between them before it
oused; sufficiently shew there could be no
interest, in profit and loss, in this particular
, as is essential to constitute a partnership.
uestion is, whether the wheat was sold to the
s upon a joint contract; that is, whether,
correspondence, and other facts set out in the
Defendants gave the Plaintiffs reason to under-
believe that they had the joint security of
ndants for the whole cargo; or whether the
ce to be drawn by any reasonable men,—and
Plaintiffs must be taken to have drawn such
hemselves, —was not, that each of the Defend-
cted separately for his moiety of the joint cargo.
looking at the whole of the correspondence,
circumstances of the case, the latter appears
the proper conclusion. That there are some
s in the letters, which, if taken separately,
mbiguity, must be admitted; unless such had
no dispute or question could have arisen; but
the preponderance very great in favour of the
on, that the contract of sale was separate, and
The Plaintiffs rely on the original order
ned by both the Defendants; and that the
ts are informed, in reply, that a purchase has

ccount
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nts pu
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be the

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to which we think the jury ought to have
pon this statement of facts, we direct the
e delivered to the Defendants.

Judgment for Defendants.

SWANSBOROUGH *v.* COVENTRY. *Nov.* 13.

The Plaintiff purchased a house of *A.*, and the Defendant at the same time purchased of *A.* the adjoining land, upon which an erection of one story high had formerly stood. In the conveyance to Plaintiff, his house was described as bounded by *building ground* belonging to Defendant:

Held, that Defendant was not entitled to build to a greater height than one story, if by so doing he obstructed Plaintiff's lights.

for a nuisance committed by obstructing the
tiff's ancient lights. Plea, not guilty.

rial before *Tindal* C. J., *London* sittings after
m, it appeared that, as well the Plaintiff's
ouse, as also the scite upon which the De-
ad since erected the house which formed the
this action, and which scite adjoined imme-
the Plaintiff's dwelling-house, were, in the
l, the property of the Postmaster-General,
art of the old Post Office; and that on the
of that year both were put up to auction in
amongst several others, and were sold at the
; the former lot to the Plaintiff, the latter
Defendant. The Plaintiff's dwelling-house
eyed to him by deed of feoffment of the
st 1831, "with all the lights, easements, rights,
and appurtenances to the same belonging, or
y appertaining;" and was described in the
bounded on the east by a piece of ground,
in the particulars of sale as a piece of freehold
ground,] constituting Lot 11. at the aforesaid
ased by *John Coventry*." It appeared further,
al, that the Plaintiff's house was an ancient
ving enjoyed the use of the front windows of
nd upper stories free from interruption; but

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that there had been, for a long time, erected u
scite of the Defendant's lot, a building of one sto
belonging to the Post Office, which obstruc
enjoyment of the windows upon the ground floo
Plaintiff's house. That building had been pulle
and the materials removed, about a year before
took place, by order of the Postmaster-Gener
upon the scite of that building the Defend
erected the dwelling-house which was now com
of, which exceeded the height of the former b
and obstructed as well the lower as the upper w
of the Plaintiff's house.

A verdict having been obtained for the Plaint
7*l.* 10*s.*, damages, subject to a rule for increasi
to 15*l.*, or for entering a nonsuit, as the Court
think fit,

Jones Serjt. obtained a rule *nisi* to enter a
He contended, that the Plaintiff, having pu
under the same title as the Defendant, at the sam
and with full notice that the land purchased
Defendant was to be appropriated to building,
taken to have purchased subject to that inconv
and, therefore, could not sustain this action.

Wilde Serjt. shewed cause. The Defendant
stand in a better situation than the vendor unde
he claims. But the vendor, having granted
Plaintiff a house, with all lights, rights,
appurtenances, could not afterwards de
own grant by obstructing the Plaintiff'
so, neither can the Defendant. In *Palme*
it was resolved, that where a man builds
part of his lands, and after sells the hc

(*a*) 1 *Lev.* 122.

1832.

SWANSBOROUGH v. COVENTR

to another, he cannot obstruct the lights. So *re* v. *Bower* (*a*), where the owner of a house t into two tenements, and let one of them; it , that the lessee was liable to an action on the obstructing windows existing in the landlord's the time of the demise, though of recent con- , and though no stipulation was made against ruction. At all events, the Defendant should nfined his building to a single story, the height rection which had formerly existed. No argu- be raised on the custom of *London*, because ndant gave no evidence of the custom, which d have done if he meant to rely on it. *Day* v. *b*)

The building by the Defendant is no dero- om the grant to the Plaintiff, because, by the language of that grant, the Plaintiff took his ounded by the Defendant's building ground. it, therefore, subject to future erections, or the *ilding ground* are without meaning. And the being clear at the time of the purchase, the nt had no means of knowing the height of formerly standing. He took the land, there- any other building ground, applicable to any erection.

Cur. adv. vult.

AL C. J. In this action, which is brought for a alleged to have been committed by the De- in obstructing the *ancient* lights of the Plaintiff's e, the question made by the parties is, whether ndant is justified in obstructing all or any of ntiff's windows; the Defendant insisting upon

(*a*) 1 *Ry. & Mo.* 24. (*b*) *Hob.* 85.

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his right to obstruct *all*, the Plaintiff as to *any*. It appears, that as well t ing-house, as also the scite upon w has since erected the house which f this action, and which scite joined Plaintiff's dwelling-house, were, in property of the Postmaster-General, old Post Office; and that on the 6 both were put up to auction in two l others), and were sold at the same lot to the Plaintiff, the latter to th Plaintiff's dwelling-house was conve of feoffment of the 29th *August*, 1 lights, easements, rights, privileges, to the same belonging or in anywise was described in the deed, as "boun a piece of ground described in the p a piece of freehold building ground at the aforesaid sale, purchased by appeared further at the trial, that t was an ancient house, having enjo front windows of the first and upp interruption; but that there had b erected upon the scite of the Defend of one story high, belonging to the obstructed the enjoyment of the ground floor of the Plaintiff's hou had been pulled down, and the mate a year before the sale took place, by master-General; and upon the scite Defendant has erected the dwelling- complained of, which exceeds the he building, and obstructs as well the windows of the Plaintiff's house. facts, the Plaintiff contends that the right to erect a building on the lot

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SWANS-
BOROUGH
v.
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obstruct *any* of the windows of the Plaintiff's g-house. The Defendant, on the other hand, s that he had a right to build to any extent he proper, notwithstanding the obstruction of all intiff's lights.

well established by the decided cases, that he same person possesses a house, having the se and enjoyment of certain lights, and also s the adjoining land, and sells the house to person, although the lights be new, he can- r can any one who claims under him, build e adjoining land so as to obstruct or interrupt oyment of those lights. The principle is laid y *Twisden* and *Wyndham* Js., in the case of v. *Fletcher* (*a*), "That no man shall derogate s own grant." The same law was adhered to case of *Cox* v. *Matthews* (*b*); by *Holt* C. J., in l v. *Pryor* (*c*); and, lastly, in the later case of n v. *Richards*. (*d*) And in the present case, the the Plaintiff and the Defendant being sales by e vendor, and taking place at one and the same e think the rights of the parties are brought he application of this general rule of law. It is ed, however, on the part of the Defendant, that umstances of this case form an exception to the rule, inasmuch as it appears, by the description Plaintiff's own conveyance, that his house was d by a piece of ground, described in the par- of sale as *building* ground, and purchased by endant; that such description operated as notice Plaintiff that he bought subject to the Defendant's build; and as there was no restriction or limit- to the exercise of such right, he might build

(*a*) 1 *Lev.* 122.
(*b*) 1 *Ventr.* 237.
(*c*) 6 *Mod.* 116.
(*d*) 1 *Price*, 27.

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to any extent or height whic
although to the obstruction o
without any derogation of the
him. But we think, with refere
case, this conclusion cannot fol
veyed to the Plaintiff a messuag
easements, without any restrictio
we think it would be attributing
description of boundary in this
to operate, indirectly, to the de
expressly conveyed by the d
"building ground" is a loose a
and may be satisfied as well by
building which should leave th
gether undisturbed, or partiall
altogether blocked up. The que
is the meaning most consistent
vendor to both parties? And,
of fact, there had been a build
question, for a very long perio
demolished, which extended o
the first floor of the Plaintiff'
gives the limit and extent intend
description, so as at once to sati
the same time to prevent the ven
own grant. This is in effect not
explanation of the terms of the
the Defendant could not be a
striction at the time of his pur
was no longer in existence. B
Defendant could not, under a
by such a description, erect a
injure the rights of strangers; sc
would be necessary on his part b
extent of his rights; and the sam
inform him as to the rights of

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information as to the rights belonging to the
's house. By this construction, both parties
benefit of their respective grants; the Plaintiff
enjoyment of those rights which the premises
d in the hands of the vendor, and the De-
has the right to build to the extent of the former
. As to the custom of *London*, as no evidence
ven, it is altogether unnecessary to discuss it.
erefore, think the verdict should stand for 7*l.* 10*s.*,
he damages occasioned to the Plaintiff by the
ant's building to a greater height than he had the
do.

Judgment for Plaintiff accordingly.

, Demandant; GRIFFITH, Tenant; JONES, Vouchee.

Nov. 13.

above recovery, suffered in the court of great
on for the county of *Carnarvon*, in the year 1804,
f entry was sued out by the proper demandant
the proper tenant; and, as well from that writ
notes on the back of it, and other documents
accompanied it, and which were upon the files of
rt, it was evident that the recovery between the
was arraigned at bar; that the tenant appeared
n and vouched over to warranty the tenant in
o also appeared in person and vouched over the
n vouchee. It appeared further, from a note on
k of the writ, that the deputy prothonotary of the

By 1 *W.* 4. *c.* 70. *s.* 14. the jurisdiction of the courts of great session in *Wales*, as to recoveries, is transferred to the Court of C. P.

The officer of the court of great session having omitted to enter of record a recovery duly suf-

bar in 1804, the Court of C. P. ordered it to be done *nunc pro tunc*, under of 1 *W.* 4. *c.* 70., which gives that Court the like power to *amend* a reco- he court of great session, as if it had been suffered in C. P.

Court

1832.

EVANS, Demandant; GRIFFITH, Tenant; JONES, Vouchee.

Court received the sum of 3*l.*, the usua
ing a recovery where the parties app
and for entering the same on the rol
script thereof. But, upon the strictest
of that recovery, nor any *incipitur* of a
upon the rolls of the Court, althoug
were entered upon the rolls of the sam

It was not the practice of the Co
turn a writ of seisin, and none had b
case. The tenant died some years aft

Upon affidavit of these facts, an o
obtained that the person in whose cust
the court of great session are kept
above recovery upon record, *nunc pro*

Merewether Serjt., on the part of t
obtained a rule *nisi* to discharge th
ground that the jurisdiction of the cou
in these matters was abolished by t
c. 70., and transferred to the Court of
and that the twenty-seventh section of
powers the Court of Common Pleas to
not to enter it *ab initio* on record. I
was never executed, for no writ of se
or returned: until the return of that
incomplete; *Swan* v. *Broome* (*a*), *Sheeps*
and the tenant being now dead, the wr
cuted: *Lewis d. Earl of Derby* v. *With*

Wilde Serjt. in support of the orde
states that a writ of seisin was never i
coveries in *Wales*; and, at all even
would have been no more than a f
officer of the Court. In the cases

(*a*) 3 *Burr.* 1596. (*b*) 1 *Burr.* 410.

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EVANS, Demandant; GRIFFITH, Tenant; JONES, Vouchee.

merely turned upon the sufficiency of alle-
pon a special verdict; and in *Goodright* v.
Lord *Kenyon* said, "Lord *Derby*'s case has
een considered as a strange case; and the
succeeding times have been astonished that no
n was made to the Court of Common Pleas to
defect in that recovery, according to the usual
f that Court. There the objection was, that
no writ of seisin, which (it is well known) is
act executed."

nly question, therefore, is, whether this Court
rity to make a proper record of this recovery
W. 4. *c.* 70. *s.* 27., which enacts, that "the
Common Pleas shall have the like power and
to amend the records of fines and recoveries
retofore in any of the courts abolished by this
the same had been levied, suffered, or had, in
of Common Pleas."

court of great session has no longer any juris-
reat inconvenience and injustice may be done,
extended construction be put on the word
nich is only used by way of example, as the
f the Warden of the *Fleet* in 1 *R.* 2. *c.* 12., on
has been held, that debt for an escape lies
ery gaoler; or the mention of the bishop of
in the statute of *circumspectè agatis*, 13 *Ed.* 1.,
s been held to extend to all other bishops.
object of the legislature was to give this Court,
tter of *Welsh* recoveries, all the power which
longed to the court of great session; and it
contended, that while that Court had autho-
ntry now required might not have been made
ne as a matter of course.

(*a*) 5 *T. R.* 179.

Mere-

1832.

EVANS, Demandant; GRIFFITH, Tenant; JONES, Vouchee.

Merewether. By no principle of c
word *amend* be taken to signify *crea*

TINDAL C. J. The question in
of an application made by certain per
Ellen Jones, who suffered a comm
court of great session for the county
year 1804, which application calls
direct the person, in whose custody
said court of great session are kep
covery upon record. It appears by
have been laid before us, that a wr
out by the proper demandant agains
and as well from that writ as from
it, and other documents which accor
are upon the files of the Court, it
recovery between these parties wa
that the tenant appeared in person
to warranty the tenant in tail, wh
person, and vouched over the comm
pears, further, from a note on the bo
the deputy prothonotary of the Cou
of 3*l.*, which is stated to be the usua
a recovery where the parties appea
for entering the same on the roll, a
thereof. But upon the strictest se
this recovery, nor any *incipitur* of
upon the rolls of the Court, althou
are entered upon the rolls of the
It seems, therefore, established with
that a recovery was actually suffered
form, but that the officer of the Co
the fee for entering the same on rec
his duty, neglected to make up the

1832.

EVANS, Demandant; GRIFFITH, Tenant; JONES, Vouchee.

mmon recoveries on the rolls of the Court is the security of the parties; the suing out of n which the recovery is suffered, the appear- ne tenant, the voucher and appearance of in tail, the voucher over of the common nd the consequent judgment of the Court ult, are of the substance and essence of the The practice of entering these proceedings ls of the Court not improbably originated tatute 23 *Eliz. c.* 3. *s.* 1., by which it is en- the enrolment shall be made at the request of any person; and such enrolment is de- e of as good force and validity in law, as the being extant or remaining, were or ought by There can be no doubt, therefore, but that f great session, if it had still existed, would, application, have supplied the defect occa- the negligence of their own officer, by direct- rolment to be made, *nunc pro tunc*; and that would have done the same, had the common een suffered therein. But the objection made plication on the part of the tenant in tail is, e power and authority of the courts of great *Wales* ceased and determined at the com- t of the act of 1 *W.* 4. *c.* 70., under the provi- e fourteenth section of that act; and that the enth section gives no authority to this Court he recovery to be entered on record. The he latter section, if construed strictly, and to might certainly be held to give no authority urt beyond that of *amending* a record already the roll; but we think this provision of the remedial, and, consequently, that it should ot a strict, but so far a liberal construction, eet and remove the difficulty which the act created. For, as the act has abolished the ancient

1832.

EVANS, mandant; RIFFITH, Tenant; JONES, Vouchee.

ancient jurisdiction, it has taken awa
that remedy which he would otherwi
against the consequences of the negle
the Court; the enactment, therefore,
of Common Pleas shall have the like
rity to *amend* the *records* of fines and
heretofore in any of the courts abolis
if the same had been levied, suffer
Court of Common Pleas," may be w
a power to enter up the whole record
rials are found upon the files of the
good record altogether; and not to
amending of a faulty record, or the
record where a formal *incipitur* only
the plea roll. Many instances occur
a similar construction of statutes:
gives a writ of error to him *in reversi*
life lose in a *præcipe*; but it was res
the statute speaks only of reversions,
also taken to be within the purview
ter's case. (*a*) The action of debt for
lies against every sheriff and gaoler
escapes out of execution, is grounded
1 *Rich.* 2. *c.* 12., which is altogether s
and gaolers, and mentions only the W
So the statute of *Circumspectè Agatis*,
mentions only the Bishop of *Norwich*
extended to include all other bishops
of *Westminster* 1. gives a remedy wh
toll is taken;" by construction of la
plies "either where a reasonable toll
sive toll is taken, or where no toll at
toll is unjustly usurped." (*c*) In these
instances, the particular expression

(*a*) 3 *Rep.* 4. (*b*) 2 *Inst.* 487.

1832.

EVANS, Demandant; GRIFFITH, Tenant; JONES, Vouchee.

upon only as an example of other cases lying same mischief, and, therefore, calling for the dy. It has been urged that no writ of seisin sued out, and that, until the return of such e sheriff, the recovery is not executed; but r to this objection is, first, the fact disclosed davit, that it was never the practice or custom rt of great session to issue any writ of seisin, cure any return thereof. And if the issuing rit were necessary to perfect the common re- is a mere formal proceeding, which ought to taken by the officer of the court, who had is fees for making the recovery complete. And objection that the tenant is now dead, such ob- n only be valid where he dies before the re- uld have been completed by the rules of the t here the parties long outlived the giving of in the action.

ink, therefore, this Court has, by the proper on of the statute, power to give the relief r; and that to doubt it, would be to put in e titles of many of the estates in *Wales*. We nsequently, that the rule which has been ob- rescinding a former rule, calling on the deputy ary to enter this recovery on record, must rged.

Rule discharged.

1832.

Nov. 13.

ORCHARD v. (

An affidavit that the party did not procure sufficient bail, because he expected to settle the cause, is not a sufficient reason to entitle him to change his bail.

ANDREWS Serjt. had obta
and justify bail, upon an
that the Defendant did not p
first, because he expected to se

Bompas Serjt., who shewed c
was not a sufficient reason for
bail at first; and that, under
Trin. 1 *W.* 4., the bail could
leave of the Court, who wo
reason.

TINDAL C. J. That rule wc
the party who proposes to ch
adequate reason for not havin
first. The reason now assigne
the rule must be

1832.

STANBURY *v.* GILLETT. *Nov.* 14.

R for a dog. Notice had been given for
a common jury at the sittings after *Easter*
the cause stood fifth on the list; but on the
y, the first day of the sittings, the Defendant
the Plaintiff a rule for a special jury. In
e of this, the cause stood over till the sittings
ty term, and was fixed for trial by a special
25th of *June*. On the 22d, however, when
ate for the Plaintiff to procure the attendance
esses within the time appointed for common
, the Plaintiff was apprized by the Defend-
ey that he had not received any directions to
ith the special jury, and up to the present
ecial jury had not been struck.
hese circumstances,

The Court will discharg a rule for a special jury, where it has not been dul acted on, an appears to have been obtained for the purpose delay.

erjt. obtained a rule *nisi* to discharge the rule
al jury, on the ground that it must have been
nly for the purpose of delay.

Serjt. showed cause, and offered to strike the
with; but

urt thought there had been an abuse of its
nd made absolute the rule for the discharge
e for a special jury.

Rule absolute.

1832.

Nov. 14. PATERSON *v.* P

An engagement, in consideration of forty guineas to pay 100*l.* in case *Brazilian* shares should be done at a certain sum on a certain day, subscribed by several persons, each for themselves, Held, a policy of insurance, and void under 14 *G.* 3. *c.* 48.

THE declaration stated that the 29th of *April* 1829, to sideration that Plaintiff would p tain sum of money, to wit, the Defendant then and there assu mised Plaintiff to pay to him a to wit, the sum of 100*l.*, in case Mining shares should be done share on or before the 31st And Plaintiff averred that he di &c. at, &c. pay to Defendant guineas; and that afterwards, a day of *December* 1829, to wit, o Imperial *Brazilian* Mining share share; of all which several pre wards, to wit, on, &c. at, &c. had Defendant, afterwards, to wit, o 1830, at, &c., was requested b the said sum of 100*l.*, yet Defe promise and undertaking, but ulently intending craftily and s defraud Plaintiff in that behalf, d he was so requested as aforesai wards, pay the said sum of 100*l.*, Plaintiff, but wholly neglected a wit, at, &c.

Plea, general issue.

In support of this declaratio trial before *Tindal* C. J., put in stamped with a 20*s.* stamp.

1832.

PATERSON v. POWELL.

sideration of forty guineas for 100*l.*, and ac- that rate for every greater or less sum, re- ,

ave hereunto subscribed our names do, for everally, and for our several and respective cutors, administrators, and assigns, and not other or others of us, or for the heirs, exe- ministrators, or assigns of the other or others me, engage, and promise that we respectively, veral and respective heirs, executors, admi- or assigns, shall and will pay, or cause to be the said ,

cutors, administrators, and assigns, the sum of money, which we have hereunto respectively , without any abatement whatever, —In case rial *Brazilian* Mining shares be done at or *l.* per share on or before the thirty-first day *er*, one thousand eight hundred and twenty-

James Powell. One hundred pounds. 29th of 829.

Henry Hodges. One hundred pounds. 29th of 829.

l. P. Johnson. One hundred pounds. 29th of 829."

ct having been found for the Plaintiff with nages, a rule *nisi* to enter a nonsuit instead ned by the Defendant in *Hilary* term last, on d that the Defendant's name did not appear in of the contract, and that the transaction was l void under 18 *G.* 2. *c.* 34.

points were discussed at considerable length, Court suggested that the contract was a policy ce, and void under 14 *G.* 3. *c.* 4., which, after at "it hath been found by experience that the

1832.

PATERSON v. POWELL.

making insurances on lives o
assured shall have no intere
chievous kind of gaming," f
that "from and after the p
surance shall be made by an
politic or corporate, on the li
persons, or on any other ev
whereiu the person or person
on whose account such policy
shall have no interest, or by w
and that every assurance mac
tent and meaning hereof, sh
intents and purposes whatsoe

An argument on this que
Court, and now entered on b

Coleridge Serjt. for the P
entitled to recover his whole
on which he sues constitute
innocent topic, and not a poli
by 14 G. 3. c. 48. That an
covery of a sum depending
cannot now be disputed. C
present contract falls within
and not within any of the de
surance. *Johnson* defines a w
upon a chance or performa
and mischief made a wager
power in me." A bet he defi
won on certain conditions."
contract for the payment of
policy of insurance is essential
for every policy of insurance
person from some risk to w

(a) 3 *Tau*

1832.

PATERSON v. POWELL.

i. e. must indemnify the assured from the
aces attendant on the happening of that risk,
risk insured against ought to be one in which
insured has an interest. In *Lucena* v. *Craw-*
mong the reasons advanced for reversing the
below, it is said, "There is a material dis-
etween a contract of wager and a contract of
; the first may have for its subject any specu-
nce or expectation, however vague or un-
nd may be claimed without proof of loss or
aving accrued to the party for whose benefit
nded; but a contract of insurance cannot have
ce or expectation for its object, because bare
expectation, though liable to failure and dis-
ent, are not susceptible of loss or damnification,
fore cannot be made the objects of an in-
which presupposes the loss of some right of
ither in possession or in action."

istinction runs through every good definition
of insurance. At p. 295, *Mansfield* C. J. says,
nition in *Valin* is, 'assecuratio est conventio de
aliunde transferendis pro certo præmio, seu
io periculi.' In *Loccen.* lib. 2. c. 5. note,
ericuli, ita dicta, quod alterius periculum in
um it; aut in se recipit.' In *Roccus*, 'asse-
t contractus quo quis alienæ rei periculum in
obligando se sub certo pretio ad eum com-
n si illa perierit. Ideo valet pactum ut si
væ venierint in portum solvetur certa summa,
perierint teneatur assecurator solvere damnum
tionem istarum mercium.'" At p. 300, *Law-*
ys, "These definitions, by writers of different
are in effect the same, and amount to this,—
nce is a contract by which the one party, in

(*a*) 2 *N. R.* 270.

1832.

PATERSON v. POWELL.

consideration of a p
risk, becomes securit
suffer loss, damage,
the perils specified
exposed to them." "
" assecurationis cont
seu de quâvis re q
interitui." *Potier*, T
gives the following de
est un contrat, par le
du risque des cas fo
posée, et s'oblige e
demniser de la perte
s'ils arrivaient, moyen
tractant lui donne, o
prix des risques don
espece de contrat de
deurs, l'assuré est l'
décharge des risques
assurée. Les assure
l'assuré, et s'obligent
la décharge de ces
risques, et en s'oblige
prime, que l'assuré pa
reurs, est le prix de
p. 439. " Il faut, 1°
qui soient la matière
fasse assurer par l'aut
contrat d'assurance q
qui en soient la mat
contrat."

According to these
sent case must be este
or person exposed to i
upon the occurring of
to be paid in a certain

14 *Geo.* 3. *c.* 48. made any difference between this ordinary wager? In consequence of the mis- casioned by wagering policies on marine risks, lature first prohibited such policies on ships or goes by the statute 19 *Geo.* 2. *c.* 37.; and after- y 14 *Geo.* 3. extended the prohibition to policies and other events; but from the title of that act, confined to insurance on lives, it is clear that ct of the legislature was directed to policies of e strictly so called and "events" must be in- o mean such risks as are the ordinary subjects ance. Now the mere circumstance of reducing to writing, and procuring several persons to n it, will not make it a contract of insurance. on a legal horse-race, reduced to writing, and ed by many betters, would not be a policy his act. And in *Good* v. *Elliott* (*a*), although . was dissentient, the Court held, that a wager had purchased a waggon of *B.* was not void at law, nor prohibited by 14 *Geo.* 3. *c.* 48. In v. *Thackeray* (*b*), the contract was that *A.* pay *B.* 7500*l.* in consideration that *B.* should 0,000*l.*, or such proportion of that amount as his legal general creditors: and the Court upon it as a wager. *Roebuck* v. *Hamerton* (*c*) relied on for the Defendant; but that case only that a wager on the sex of the Chevalier *D'Eon*, ad been held illegal in *Dacosta* v. *Jones*, could rendered legal by being dressed up in the form icy: the question, therefore, on the 14 *Geo.* 3. ajudicial, and not well considered.

upposing this instrument to be a policy within ning of the 14 *Geo.* 3., the Plaintiff is entitled er back the premium, as a sum paid without

R. 693. (*b*) 2 *Young & J.* 156. (*c*) *Cowp.* 737.

1832.

RATHBONE v. POWELL.

consideration. Where, contract has paid money and the contract has be *Bourdieu* (*b*), such party cover his money back; t cutory: for whether a co or executory, must depe event which is to determi the stipulations contract plaintiff is rather in the deposited money with wager; which money h holder, if not actually pa *Smith* v. *Bickmore* (*d*), *J* v. *Jackson*. (*g*)

Taddy Serjt. for the declared on is a policy o statute 14 *Geo.* 3. Th relied on are definition statute is directed again have nothing to act on instruments which hav policy. The obvious i struments bearing the f by underwriters, shall b have no interest in the The word *event* was int of meeting such a tran case of *Roebuck* v. *Ham* there was as follows (*h*)

(*e*) See the language of Court in *Tappenden* v. *Ran* 2 B. & P. 471. *Aubert Walsh*, 3 *Taunt.* 277.

(*b*) *Doug.* 468.

1832.
PATERSON v. POWELL.

neas for 100*l.* received of Messrs. *Roebuck* and
, we, whose names are hereunto subscribed, do
y promise to pay the sums of money which we
reunto subscribed, on the following conditions,
case the Chevalier *D'Eon* should hereafter
o be a female. Valued at the sum insured,
farther proof of interest than this policy. In
whereof we, the assurers, have subscribed our
—And the same argument was used as upon the
occasion; so that the decision of the Court was
n without consideration. So, in *Wharton* v. *De*
(a), the policy was on the contingency that the
of America should be declared independent;
ord *Mansfield* thought the case too clear for
nt.

Court relieved *Taddy* from arguing the question
e return of premium, and after hearing *Coleridge*
, pronounced judgment as follows:

AL C. J. In the view which the Court takes of
e, it becomes unnecessary to recur to the grounds
h the rule for a new trial was obtained, because
all of opinion, that the instrument on which the
f has sued is a policy of insurance within the
14 *G.* 3. *c.* 48., the Plaintiff having no interest in
ject-matter of the insurance, and no disclosure
made of any party who has such interest: the
in that respect presents only a blank. First,
as the object of the statute 14 *G.* 3.? To pre-
mbling under the form and pretext of a policy
rance by parties who have no interest in the sub-
tter of such assurance. There is a statute of
mer reign, 19 *Geo.* 2. *c.* 37., confined indeed to
insurances, but the preamble of which is not

(a) *Park. Ins.* 573.

immaterial

1832.

PATERSON v. POWELL.

immaterial in considering th
in passing the statute 14 (
"it had been found by e
assurances, interest or no
proof of interest than the
of many pernicious practice
ships, with their cargoes, h
lost and destroyed, or take
war; and by introducing a
or wagering, under the pre
shipping and fair trade, t
design of making assuran
goes on to prohibit insura
goes, interest or no interest
interest than the policy, *or*
ing. The object, therefore,
surances: but, in the next
legislature had not gone far
act of 14 *Geo.* 3., entitled
surances upon lives, and for
ances, except in cases wher
have an interest in the li
insured." It is a well estab
that the title of an act will
the meaning of the operati
confine the effect; and the
larger than the title. "No
any person or persons, bod
the life or lives of any pe
other event or events what
or persons for whose use,
count such policy or pol
have no interest, *or by wa*
Nothing can be more clea
words were inserted in fu
of the former act. It has

1832.

PATERSON v. POWELL.

ns of the act are confined to cases where there subject-matter of insurance exposed to peril. If what construction are we to put upon those more ral words "*or on any other event or events what-*r," which appear to have been inserted, as it , in anticipation of such an argument. Then, only two cases on the statute are insurances on s in which the parties were not interested. In uck v. *Hamerton*, a policy upon the sex of the valier *D'Eon* was holden to be a policy within the te 14 *Geo.* 3. *c.* 48.; and in *Mollison* v. *Staples* (*a*), e a policy was made on the event of there being pen trade between *Great Britain* and the province *Maryland* on or before the 6th *July* 1778, Lord *sfield* said "that it was clear the plaintiff could recover." In both cases, therefore, the decision not on the statute's applying to insurances where ubject-matter of insurance is legitimate, but to *events* hich the parties insuring have no interest.

ur decision, therefore, in this case, must turn on the isions of the 14 *Geo.* 3., if this instrument can be ed a policy. Upon that point we entertain no doubt. e is a premium paid, in consideration of the insurers rring the risk of paying a larger sum upon a given ngency. The instrument is open to all who may se to subscribe, that is, without restriction of ns or numbers. It then proceeds, in the usual nage of policies of insurance, "We respectively ay or cause to be paid to the sum sums of money which we have hereunto respectively cribed, without any abatement whatever, in case," If the instrument in *Roebuck* v. *Hamerton* was ly held to be policy, I can make no just discri-tion between that instrument and the present. It

(*a*) *Park. Ins.* 640. n.

is

1832.

PATTESON v. POWELL.

is true, that the policy cou
because the circumstances
But if the instrument can
that clause, we should imp
parliament if we were to c
tract. I cannot consider it
so, the Plaintiff's claim mu
was given by Lord *Mansfi*
first, that this is an insura
party had no interest; or,
disclose the name of any p

As to the claim for a
current effect of the decisi
on an illegal contract to r
certain event, the contract
takes place, and the money

GASELEE J. It is not
what is the distinction in
wagering policy, because th
policy within the meaning
strument, as appears from
carried round from unde
language is the same as in
signature there is the date
no words are left out but
an insurance of this natu
to average; and the rise
clearly an event within the

BOSANQUET J. I think
within the mischief and
14 *Geo.* 3. The preamble
hath been found by expe
surances on lives, or othe
shall have no interest, ha

kind of gaming." That this was a gaming or wagering transaction cannot be disputed, for the parties have no interest in the event insured; and although, after the decisions which have been pronounced, the Courts cannot now say that a simple wager may not be the subject of a suit, yet they will not extend the principle of those decisions; and if the wagering transaction assumes the form of a policy of insurance, it is prohibited by the 14 *Geo.* 3. Does this contract assume such a form? It begins, "In consideration of forty guineas for one hundred pounds, and according to that rate for every greater or less sum received of , we, who have hereunto subscribed our names, assume and engage that we respectively will pay to the said the sums which we have respectively subscribed, in case," &c. So that here we have a premium; an indefinite number of subscribers contemplated, who engage, not each for the other, but separately, on a given event, to pay a larger sum than the premium; while the separate dates for each receipt of premium, lead to the inference that all the signatures were not obtained at the same time. These are so much the leading features of a policy of insurance, that we cannot doubt that this contract falls within the meaning of the statute, which enacts, that such an instrument shall be void, if the parties insuring have no interest in the event insured against. Here, at all events, the instrument does not disclose the name of any party interested in the risk. That circumstance, indeed, has been relied on as an argument to show that the instrument is not a policy; but to draw such an inference from the omission, would render the statute in a great degree nugatory.

As to the premium, I agree with the rest of the Court; the party is not to take the chance of the event, and after that to recover the premium, if the contract turn out to be illegal.

ALDERSON

1682.

PATERSON v. POWELL.

ALDERSON J. Under the void if the party have no int or the name of the party i Here the event was one in w interested, and even if he w disclose the name of any part it falls within the prohibition

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Nov. 15. WICKHAM, Demandant; Deforci

Fine allowed to pass without affidavit on parchment, under what circumstances.

UNDER the following ci the motion of *Wilde* S pass, notwithstanding the af was on paper instead of parc

The conusors lived at *Le* and concord were sent, toget pared on parchment accord Court. The documents wer affidavit, in lieu of which, an ing required by this Court, were sent, engrossed on *Tusc* to the *præcipe* and concord peared that the affidavit had petent authority, and the authenticated, the original a the tribunal, according to th copies were attested by the signed by a notary public; lator of the tribunal was atte

1832.

RAMADGE *v.* RYAN.

Nov. 15.

LIBEL. The Plaintiff sought to recover damages for the following article, which appeared in the *London Medical and Surgical Journal*, a periodical publication conducted by the Defendant:

"*Tweedie* v. *Ramadge.* Dr. *Ramadge* was in attendance on a case of typhus. The patient, a young lady, was bled from the arm on a *Friday*, and eight dozen (ninety-six) leeches applied to the head and neck. On *Saturday* both temporal arteries were opened; the patient fainted, and the apothecary, who was likewise in attendance, left her. The nurse brought her round with wine and water. On the *Sunday* another dozen leeches were applied, and immediately she became delirious, when Dr. *Tweedie*'s advice was requested by the relatives. Dr. *Tweedie* having spoken apart with Dr. *Ramadge*, addressed Mrs. *Reynolds*, the sister of the patient, and said, that having attended the family before, he should be happy now to give his assistance to the young lady; but that Dr. *Ramadge*'s conduct in a late correspondence with *John Long* (*a*) had been such that no medical man of respectability could call him in or consult with him without injuring himself in the eyes of his brethren. That he bore no private pique against Dr. *Ramadge* — he believed him indeed to be clever, but his character, as regarded the above transaction, rendered it imperative for all medical men to decline acting with him, and Mrs. *Reynolds* must, therefore, choose which she would intrust.

1. It is a ground for new trial, if a juror before being sworn expresses a determination to give the verdict one way.

2. The Defendant had pleaded truth in justification of a libel, part of which alleged that a physician in refusing to act with Plaintiff, also a physician, had "honourably and faithfully discharged his duty to his medical brethren:" Held, that it was not competent to the Defendant to offer in evidence the opinion of a medical witness on this head.

(*a*) This *Long* professed to cure consumption, and was twice tried at the *Old Bailey* for the manslaughter of his patients. Dr. *Ramadge* wrote a letter in vindication of *Long*'s practice.

1832.
RAMADGE
v.
RYAN.

intrust. Dr.
was a gentle
but that Dr. T
answered him
out of the roo
the patient by
it is said, is fre
Dr. Tweedie h
duty to his m
else will do the
a medical man
suppers. Let h
to defend this n
face of the wh
we will not spa

The Defend
in justification,

The alleged
in italics, had b
The Lancet, th
upholding Quac

For that arti
Wakley, the edi
general issue;
his cause, on t
cause against
damages.

Upon the tri
counsel, after
what had been
had passed upo
Dr. *Tweedie*, p
surgeon, to say
consultation; b
to be inadmiss
Brodie should

fusing to consult with the Plaintiff, had honourably and faithfully discharged his duty to the medical profession. The Chief Justice thought the question ought not to be put, and the Plaintiff obtained a verdict for 400*l*.

1832.
RAMADGE v. RYAN.

Taddy Serjt. moved for a new trial, on the ground that Mr. *Brodie*'s testimony ought to have been received upon the same principle as the opinion of scientific men upon matters of science; *Beckwith* v. *Sydebotham* (*a*), *Severn* v. *Olive* (*b*); or of foreign lawyers on questions of foreign law; because the jury must be ignorant of the conventional rules and etiquette established in each profession, which can only be known, or only accurately known, by members of such profession. None, for example, but members of the bar can appreciate the infamy attendant on obtaining practice by courting and feasting attornies; so that it is only from the estimation of his brethren that the public can judge whether an individual conducts himself uprightly in those matters with which he is most concerned. The evidence excluded, therefore, was indispensable for the Defendant's justification.

TINDAL C. J. Witnesses skilled in any art or science may be called to say what, in their judgment, would be the result of certain facts submitted to their consideration; but not to give an opinion on things with which a jury may be supposed to be equally well acquainted. If in this cause any specific rules of the medical profession had been given in evidence, the Defendant perhaps might have been allowed to shew that the Plaintiff, by violating those rules, had rendered himself unworthy of the countenance of his brethren. But the question here was, whether a physician, in refusing to

(*a*) 1 *Campb.* 116. (*b*) 3 *Brod. & Bingh.* 72.

1832.

RAMADGE v. RYAN.

consult with the Plaint
discharged his duty
answer to that might
and peculiar opinions
a point on which the
judgment as the witnes
fore, there is no reas
trial.

Taddy then sought
that one of the juror
mined to give heavy
As to which, he read
College of Surgeons,
the cause of *Ramadge*
of that trial, a person
to them came up and
amount of damages wh
in that cause, and at t
the jury to-morrow, an
does not go that way,"
one of the deponents
addressing them had
which the individual re
enough, and that his
verdict he should giv
June 26. 1832, the d
present in the Court
ster, and that when th
called on for trial the
had on the previous
remark to them sittin
cause: that having re
question was *John Min*
they went to his resid
having obtained an inte

1832.
RAMADGE v. RYAN.

the jurymen on the trial of this cause; he said, he admitted that he had; that he had conversed with deponents at the door of *Westminster Hall* on the 25th of *June* on the subject of the verdict in the cause of *Ramadge* v. *Wakley*, and recollected the remark he then made: that he supposed deponents had come to him about a new trial in *Ramadge* v. *Ryan*, and that he knew something that would get a new trial; or words to that effect.

Other affidavits disclosed that *Hart* had been struck off the roll of attornies for fraud and misconduct.

The Court were referred to *Wynn* v. *Bishop of Bangor* (*a*), which was an action of ejectment in which a view had been granted. On making the view, one of the shewers for the Plaintiff having made certain observations upon the subject in dispute, one of the jurors observed, that by what they had seen, they should soon determine the dispute; and afterwards, on the day before the trial, he said that the Plaintiff was a neighbour, and right or wrong, he would give it for him. The Court held, that though that might form a ground of challenge, yet it was proper to allege the matter as cause for a new trial, and granted the rule. The case of *Herbert* v. *Shaw* (*b*) was cited against the application, but overruled by the Court. In *Dent* v. *Hundred of Hertford* (*c*) a new trial was granted on an affidavit that the foreman had declared that plaintiff should never have a verdict, whatever witnesses he produced.

A rule *nisi* having been granted upon the matters disclosed in the affidavits,

Wilde and *Spankie* Serjts. shewed cause upon an affidavit in which the expressions alleged to have been

(*a*) 2 *Com. Rep.* 601.
(*b*) 11 *Mod.* 111—118.
(*c*) 2 *Salk.* 645.

Iart at his ho
denied, and
on in *Westmin*
re, "Well!
had I been
n very heavy
orrow." That
he never said
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Exchequer re
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dice; — and o
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ourt, however,
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ne conduct of

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h *Hart* admitt
orrow," if sp
it way, shewed
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isparity betwe

(*a*)

1832.

RAMADGE v. RYAN.

TINDAL C. J. If the ground of application for a new trial disclosed by the affidavits on the part of the Defendant had remained unanswered and uncontradicted, I should have thought the Court justified in making this rule absolute; for it would go to create a prejudice against trial by jury if verdicts were to be the result of previous determination; and expressions such as those imputed to the juror *Hart* would have been a good ground of challenge if proved to the extent to which they have been alleged in the affidavit. In *R.* v. *Cook* (*a*) expressions of this nature were deemed so improper that the juror ought not to be asked whether he had used them, but that they ought to be proved by such as had heard them spoken. If, therefore, the expressions imputed to *Hart* had remained unanswered, this cause must have been referred to a new jury. But the conversation on the 31st of *October* is denied altogether, as is also a portion of that alleged to have taken place on the 25th of *June*; and the effect of the residue appears to me to be sufficiently answered by *Hart*'s affidavit. This is not a case, therefore, in which the existence of such injustice has been established as to call for a new trial; and the precise ground of application having been answered, the rule must be discharged.

GASELEE J. concurred in thinking, that the affidavit in support of the motion had been answered.

BOSANQUET J. The rule *nisi* was properly granted upon the affidavits then before the Court, but I think they have been answered as far as regards the application for a new trial. The situation of *Hart*, as an attorney struck off the roll, must be put out of our consi-

(*a*) 6 *St. Tr.* 337.

1832.

RAMADGE v. RYAN.

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ALDERSON J. This ru
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1832.

COCKS *v.* NASH.

Nov. 16.

To a plea that the Plaintiff had released one of two joint obligors, the Plaintiff replied that the release was given with an undertaking on the part of the Defendant, the other obligor, that the release should not operate in his discharge: Held ill.

THE declaration stated that the Defendant, by his certain writing obligatory sealed with his seal, and shewn to the Court, the date whereof was, &c. acknowledged himself to be held and firmly bound to the Plaintiff in the sum of 200*l.* of lawful money, to be paid to the Plaintiff; which said writing obligatory was under and subject to a certain condition thereunder written, whereby it was declared that if one *Mary Nash* in the said condition mentioned, and the Defendant, their heirs, executors, and administrators, or either of them, should well and truly pay or cause to be paid unto the Plaintiff the full sum of 200*l.* with 5 per cent. interest, the interest to be paid half yearly from the date of the said writing obligatory, (and on condition that half a year's notice should be given by the Plaintiff to the Defendant or the said *Mary Nash*, in a lawful manner, before requiring payment of the said 200*l.* in the condition mentioned,) without fraud or further delay, then the last-mentioned obligation should be void and of none effect, or else to remain in full force and virtue. The Plaintiff then averred that he did on the 14th of *October* 1831, to wit, at, &c. in a lawful manner give notice to *Mary Nash* and the Defendant to pay to him the Plaintiff, at the expiration of half a year after the receipt of that notice, the said principal sum of 200*l.* in the condition of the writing obligatory mentioned, and all interest thereon: but that the said *Mary Nash* and the Defendant did not, nor did either of them at the expiration of half a year from the receipt of the last-mentioned notice, or at any time before or after, well and truly or in

1832.
Cocks
v.
Nash.

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the rights, claims, or remedies of the Plaintiff against the Defendant, upon or in respect of the said writing obligatory. 1832. CASES IN NASH.

Demurrer and joinder.

Adams Serjt. in support of the demurrer. The replication is ill, for it sets up a parol undertaking to vary the release set out in the plea, an instrument under seal. By express provision or apt recital in the release itself, the operation of that instrument might have been confined to one of the co-obligors; *Simons* v. *Johnson* (*a*), *Payler* v. *Homersham* (*b*), *Solly* v. *Forbes* (*c*). But a mere parol agreement cannot alter the language of the instrument under seal, which being an unqualified release of one of the co-obligors, operates as a release of both.

It will perhaps be contended, that the plea is ill, for want of an averment that the bond on which the release was to operate, was sealed with the seal of *Mary Nash*; but such an objection can only be taken on special demurrer, for the fact that *Mary Nash* sealed the bond is involved in the allegation that the Plaintiff released her from it. Besides, the plea states, that the Plaintiff discharged *Mary Nash* from the same *writing obligatory*, and writing obligatory is a term of art which implies sealing by the obligor. 1 *Wms. Saund.* 291. *Ashmore* v. *Ripley* (*d*), *Penson* v. *Hodges*. (*e*)

Wilde Serjt. contrà. In those cases the word of art was used in the declaration; but a plea, and particularly a plea which seeks to set up an estoppel, requires more precision: the law will not intend that the party sealed the deed unless it be expressly averred; *Fitzgerald* v. *Cragg* (*g*): and though a bond set out on over recites,

(*a*) 3 *B.* & *Adol.* 175.
(*b*) 4 *M.* & *S.* 423.
(*c*) 2 *B.* & *B.* 38.
(*d*) *Cro. Jac.* 420.
(*e*) *Cro. Eliz.* 737.
(*g*) *Com. Rep.* 139.

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1892.

Cocks v. Nash.

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(*a*) 2 *Ld. Ra*
(*b*) 8 *T. R.*
(*c*) 6 *Taunt.*

1832.
COCKS
v.
NASH.

was prosecuted against *A.* jointly with *B.*, for the purpose of enabling Plaintiffs to recover payment of monies due from *B.* and *A.* to Plaintiffs, either out of the joint estate of *B.* and *A.*, or from *B.*, or his separate estate, the replication was demurred to, and the demurrer overruled. In *Goodtitle* v. *Bailey* (*a*), an instrument in the form of a release was, in order to effect the intention of the parties, allowed to operate as a grant; and Lord *Mansfield* said, "The rules laid down in respect of the construction of deeds are founded in law, reason, and common sense; that they shall operate according to the intention of the parties, if by law they may; and if they cannot operate in one form, they shall operate in that which by law will effectuate the intention."

Adams in reply was stopped.

TINDAL C. J. The first question is, whether the matters disclosed in this replication operate so in avoidance of the plea as to entitle the plaintiff to sustain his action. The plea states that, before the commencement of the action, the Plaintiff by a certain deed of release, sealed with his seal, released and discharged *Mary Nash*, one of the obligors in the bond on which the Plaintiff has declared, of and from the same, and all actions in respect thereof. The replication alleges, that the supposed deed of release was executed to *Mary Nash* with the knowledge, and at the request of the Defendant, and on the condition and undertaking, on his part, that the release should not operate to release him, or in any way prejudice the Plaintiff's claim against him. And the objection to the replication is, that it seeks, by the introduction of parol evidence, to put on an instrument under seal, a construction differing from the import of

(*a*) *Cowp.* 600.

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1832. COOKE v. NASH

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1832.
COCKS
v.
NASH.

The cases which have been referred to are answered by merely looking to the statement of them in the books: as *Hutton* v. *Eyre*, in which the deed was merely a covenant not to sue, and if this had been such, there would have been no difficulty in the case. *Solly* v. *Forbes* turned on the effect of a deed, as it was to be collected from the whole instrument taken together; and if we could collect from the whole of this deed that it was not intended to operate as a release, that case would have had some application. The first ground of answer, therefore, to the construction contended for on the part of the Plaintiff, is, that he cannot by parol averment vary an instrument under seal; and the agreement which he proposes to set up is in itself destitute of consideration.

The Plaintiff then objects to the Defendant's plea, that it does not allege the bond to have been ever executed by *Mary Nash*; but looking to the whole of the record, we think this objection is answered, particularly by the matter contained in the replication. After setting out the bond on oyer, and describing it as the bond of the Defendant and *Mary Nash*, which of itself would not be a sufficient averment that it had been executed by her, the Defendant alleges that the Plaintiff released *Mary Nash* from the same writing obligatory. It requires no more than a common intendment to say that the allegation of a release of *Mary Nash* from the bond set out on oyer, involves the supposition that she executed it as well as the Defendant; for unless she executed it, from what was she released? and the Plaintiff in his replication does not deny, but confesses and avoids such allegation, for he admits that he executed the release to *Mary Nash*. If he did, we must intend on his own shewing that she executed the bond, otherwise how could he grant the release?

The

1832.

COOKE v. NASH.

The plea, therefore, is sufficient, and, on the our judgment must be for the Defendant.

GASELEE J. I agree with my Lord Chief Ju both points. No doubt a deed may be constru release or a covenant not to sue, according to th of the parties, manifested by the contents of th but the Plaintiff cannot shew that intent b evidence. In all the cases cited, the Court tracted the meaning of the parties from the de We come then to the question as to the suffic the plea; which, if it had stood alone, migh given some rise to doubt, inasmuch as it con averment that the bond was executed by *Mary* but when we come to the replication, the admits the release of a writing obligatory, exec the Defendant and *Mary Nash*.

BOSANQUET J. I am of the same opinion. *Nash* were a party to the bond, the release operates as a release to the Defendant, unl Plaintiff shews something to alter its effect. deed of release may be explained by recital, o matter, contained in the same deed, as appear case of *Solly* v. *Forbes*; but the Court cannot an instrument of a lower degree, in explanatio instrument under seal. The only question re is, whether *Mary Nash* were a party to the bond, the Plaintiff admits by pleading over and endea to avoid the release by new matter. The plea a release of *Mary Nash* from the writing obli when the Plaintiff in his reply confesses the rele sufficiently acknowledges her to have been a p the bond.

ALDERSON J. concurring, the Court gave Judgment for the Def

1832.

RIDLEY and Others, Assignees of WHITE, a Bankrupt, *v.* GYDE.

Nov. 19.

TROVER by the assignees of *White*, a bankrupt. The validity of the commission being disputed, the act of bankruptcy, on which the Plaintiffs relied, was a warrant of attorney and bill of sale, alleged to have been given by *White* to the Defendant, by way of fraudulent preference, and in contemplation of bankruptcy; as to which,

It appeared that *White* had long been indebted to the Defendant, who was one of his relations, and, from the summer of 1827, had been frequently pressed for payment; that on the 18th of *October* 1830, the Defendant's solicitor apprized *White*, the Defendant was determined to take proceedings unless security were given, and suggested that *White* should give a warrant of attorney; *White* said, "I cannot do it whatever may be the consequence;" but, upon being further pressed, asked and obtained leave to consult his own solicitor. On the 19th, he consented to give the securities required, and executed the bill of sale at *Cheltenham* on the 25th *October*. On the part of the Plaintiffs, *Loveday*, the solicitor of *Hare*, another of *White*'s creditors, stated, that he had been long pressing *White* from day to day for the payment of the debt due to *Hare*; that *White* made various excuses up to the 25th *October* 1830, when he promised to give *Hare* security on the following day, instead of which he immediately left *Leamington*, the place of his residence, for *Cheltenham*, and *Loveday* never saw him again

On the 25th of *October*, *W.*, a trader, being pressed by *L.* for the payment of a debt, promised to give security the next day. Instead of doing so, *W.* went away immediately, gave security to *G.*, and did not see *L.* again till the 20th of *November*, when he had a conversation with *L.* about the security given to *G.*

W. having been declared a bankrupt, and his assignees relying on an act of bankruptcy alleged to have been commited in giving this security to *G.*, Held,

That the declarations made by *W.* to *L.* on the 20th of *November*, were admissible evidence towards establishing the act of bankruptcy.

1832.

RIDLEY v. GYDE.

ntinated the act of bankruptcy. From the 18th
er to the 20th of *November*, the preference of
y the deception practised with regard to *Hare*,
continued transaction. The expressions of a
t with reference to the state of his affairs at the
e almost the only evidence by which it can be
ed whether a contested assignment has been
ot or not. In *Rawson* v. *Haigh* (*a*), *Park* J.
I am satisfied that declarations made during de-
and absence are admissible in evidence to shew
ite of the departure. It is impossible to tie
time the rule as to the declarations; we must
on all the circumstances of the case; we need
the length of saying that a declaration made a
fter the fact would of itself be admissible; but
the present case, there are connecting circum-
it may, even at that time, form part of the whole
."

The *res gestæ* in question upon the trial of
e, were the execution of securities on the 19th
h of *October;* and expressions used by the bank-
those days, or perhaps the day after, might have
missible in evidence to shew the state of his inten-
on the occasion. But no case has gone the length
ting declarations made a month after the trans-
which they refer. If declarations made a month
fact are held admissible, it will be difficult to
ine, or to hold that they may not be received,
made after an interval of two, or even twelve
No transfer by a trader would be safe if open to
ment by declarations made so long after the fact.

AL C. J. The ground on which this rule has
tained is, that conversations between the bank-

(*a*) 2 *Bingh.* 104.

1832.

RIDLEY v. GYDE.

rupt and *Loveday*, manded on the pa ought not to have that securities pre Defendant were fi conversations pass affected, and that missible where the may be examined that if these conver they were admissib gone the length of done an equivocal the act are admis where he has left hi done either in furt payment of a debt; creditor, or has be not confined to the for, in *Bateman* v. *A* after was received fi case consider, whet received does or time of the dispute on which the Plain fraudulent transfer capable of being pr only be established l rupt, and his condu whole transaction; versations objected panying the act of tained is, what wa bankrupt to give a another creditor wa

1832.

RIDLEY v. GYDE.

Loveday stated, that he had from day to day pressing the bankrupt to give security to *Hare*, his creditors; that the bankrupt made various up to the 25th of *October*, when he promised to e security required on the following day; instead ng it, however, he went to *Cheltenham*, and was n again by *Loveday* till *November* the 20th. *Love*en renewed the pressure which the bankrupt had by his retreat to *Cheltenham*, and the conversation day is no more than a resumption of the con- on broken off on the 25th of *October*. He then him where he had been, and what security he had o *Gyde*. It seems to me not immaterial, but ex- material and a part of the entire transaction, that 20th of *November* the bankrupt being questioned the security he had given in the interval of his , gave a false account of the matter, pretending did not know the nature of the security, when it clearly that he had not executed the warrant of y to *Gyde* till after a consultation with his pro- al adviser as to the nature of the instrument. To it this conversation would be to shut out the best ce in the cause. The letter from the bankrupt was d on the same principle, that it formed part of ter on which the Judge and jury had to decide, ; why the bankrupt had yielded to the pressure of editor after having refused to yield to the pressure her. I think it fell within the principle on which declarations have been admitted in other cases, it it was not too distant in point of time.

K J. I do not say that isolated and distinct de- ons of a bankrupt are to be received in evidence, en the effect of an equivocal act depends upon tives by which the bankrupt was actuated, a know- of those motives can only be obtained by evidence expressions he has used, coupled with the circum-

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of time too great for the admission of declar- 1832.
ade in the absence of the party.

RIDLEY v. GYDE.

NQUET J. I am of opinion that the two con-
ns of the 25th of *October*, and the 20th of *No-*
were admissible in evidence. The letter of
er was not objected to at the trial, and there-
confine my opinion to the two conversations.
neral rule, no doubt, a bankrupt who has ex-
a security cannot be allowed to impeach it as
the grantee; but the question here is, whether
rity in question was given by way of fraudulent
ce; and in such cases the material enquiry is
as the situation, conduct, and language of the
t with reference to the whole transaction. Here,
versations, have been given in evidence, from
appears that the bankrupt, being pressed by one
reditors to give security for a debt, made false
volous excuses, which of themselves would be
e of an embarrassed state of affairs. But they
ence on another ground: about the time that the
was given to *Gyde*, the other creditor was also
the bankrupt. Now if a trader, being pressed
creditor, makes excuses for not giving security,
he same time is found to be giving security to
that raises a question for the jury, whether the
who obtains the security, obtains it without
: to establish this, the declarations of the bank-
st be admitted, not so much as declarations, but
of his conduct from which the inference is to
n that the security was given without pressure.
t infringing on the general rule as to the ad-
ty or inadmissibility of such declarations, I think,
case, they ought to have been received as being
he conduct of the bankrupt.

Rule discharged.

1832.

Nov. 20.

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" Unless you pay what you owe me, I shall take immediate measures to recover possession of the property," addressed to a tenant at will, by the party entitled in fee, Held, a sufficient determination of the will

1832.
Doe dem. PRICE v. PRICE.

s Serjt. obtained a rule *nisi* accordingly, which, he time arrived for making it absolute, the Court on him to support.

contended that the Defendant was a tenant at d that the letter in question contained no express ination of the lessor's will; the letter was only onal, and no time was fixed within which the De- was to accede to the conditions proposed. But fendant could not be treated as a trespasser until ad been an absolute determination of the lessor's *Goodtitle* v. *Herbert* (*a*), *Right d. Lewis* v. *Beard* (*b*). n v. *Rawlins* (*c*), a case of permissive occupation, h there had been no regular determination of the d's will, *Le Blanc* J. asked, "from what time the ejectment brought, it could be said that the ant became a *trespasser*?" and it would be dif- o answer that question in the present case.

DAL C. J. Upon the facts reported in this ac- appears that *Thomas Price*, the Defendant, had ed the land in question to his brother *Robert* the lessor of the Plaintiff, seventeen years ago. was some dispute whether *Robert Price* had or t paid a consideration for the property; the one g and the other denying that a debt was due *homas* to *Robert Price*, to the amount of the value land. *Thomas Price* after an absence of some was let into possession by his brother about fif- ears ago, upon what terms does not appear, but tinued in possession till the present time and d the land. It cannot be contended, therefore, had a less interest than a tenancy at will; because, occupation of such length, it would be hard, if,

(*a*) 4 *T. R.* 680.
(*b*) 13 *East*, 210.
(*c*) 10 *East*, 262.

1832.

Doe dem.
Price
v.
Price.

1832.

Doe dem. PRICE v. PRICE.

stion of the will. *Doe d. Roby* v. *Maisey* (*a*). In way, therefore, the Defendant's right to occupy an end.

NGUET J. It is clear that the title to the free- as in the lessor of the Plaintiff, and that, except h his permission, the Defendant had no claim to upation of the property. Under these circum- a letter is written on the part of the lessor of intiff, from which it appears that the Defendant de some claim to the title-deeds, and we must at letter as it would be read by any man of plain tanding. It is impossible, so reading it, not to the Defendant was no longer to have permission the property, unless he acquiesced in the terms ed by the lessor of the Plaintiff, and those terms ejected, the permission was at an end.

NSON J. concurred.

Rule discharged.

(*a*) 3 *B.* & *C.* 769.

MORGAN *v.* MORGAN.

Nov. 21.

Where an attesting witness could not be found after sufficient enquiry, letter, not dis-

ON the trial of this cause, an action of debt on ond, the Chief Baron permitted evidence to be f the handwriting of *Jones*, an attorney, who was esting witness, on the ground that he could no- at evidence of his handwriting was admissible, although a is retreat, had been received from him a few days before the trial.

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1832.
MORGAN
v.
MORGAN.

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Percy (*b*); when t

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been received of th
it has appeared fr
the witness could

(*a*) 2 *East*, 183.

1832.
MORGAN
v.
MORGAN.

nable expectation of producing him at a future
the present case, admitting the enquiry to have
icient, which it was not, because it ought to
secuted earlier than five or six days only before
it is plain from the circumstance of the wit-
erk having received a letter from him a short
re the trial, that he was alive and at no great
and might reasonably be expected to be forth-
efore long: the trial, therefore, ought to have
tponed. The validity or nullity of the bond
epend altogether upon his testimony; and in
v. *Fermor* (*a*), in an action on a *post obit* bond,
ring that the attesting witness was an attorney
erly had an office in *London*, and resided at
, it was held, that it was not enough to let in
of his handwriting to prove the execution of
, that he had disappeared from his office in
or a twelvemonth before the trial, and had not
rd of during that period by persons who knew
hout shewing that search had been made after
e house he occupied at *Sydenham*. And Lord
ugh said "I will admit the secondary evidence,
ew that you could not, by any means, find out
ting witness. But I will watch, very narrowly,
of of search. This extension of the rule may
dangerous consequences. If the attesting wit-
ws too much of the transaction, and his ex-
h would hazard the validity of the deed, he may
ut of the way, and we may be amused at the
h an account of his having absconded."

AL C. J. This case falls within the principle
ed by *Crosby* v. *Percy*, and *Cunliffe* v. *Sefton*,
only question is, whether every effort was made

(*t*) 2 *Campb.* 282.

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1822.
MORGAN
v.
MORGAN.

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GASELEE J.
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BOSANQUET J
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ALDERSON J.

1832

VARLEY v. MANTON. *Nov. 21.*

Plaintiff declared that, on, &c. at, &c. by a
ain agreement then and there made between the
f and the Defendant, the Plaintiff agreed to
he Defendant a three-horse power portable
g machine, to be worked by a four-horse works;
h from twenty to twenty-five quarters of wheat
; to put up the new machine at *Tanholt*, where
one then stood, in a complete workmanlike
; and to take down, at the Plaintiff's own ex-
he old one then standing at *Tanholt*; the De-
to deliver the old machine at the Plaintiff's yard
boro', and also to fetch the new one to *Tanholt*:
one to be taken by the Plaintiff at 20*l.*, and
endant to pay the Plaintiff 30*l.* in exchange for
one: the new machine to be put down, in a
e working state, in two months from the date of
eement. That the Plaintiff and the Defendant
l there undertook, and faithfully promised each
spectively, to perform and fulfil the said agree-
all things. That the Plaintiff, confiding in the
reement and undertaking of the Defendant,
ds and within the time mentioned in the agree-
t, &c., made the said three-horse portable
g machine for the Defendant, and did, within
e aforesaid, put up the new machine at *Tanholt*
plete workmanlike manner, and took down the
at his own expence, and did then and there take
e at 20*l.*, according to the provisions of the said
nt, to wit, at, &c. And although the said new
was put down in a complete working state
he time in that behalf mentioned, whereof the
Defendant

Pleading: a general averment of performance, "*according to the provisions of the said agreement*," is sufficient on general demurrer, although the agreement contains conditions precedent, specific averment of the performance of which would have been indispensable on special demurrer.

1832.

YARLEY v. MANTON.

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agreement," at th
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at 20*l.*, or, at m
which the Plaintif
be extended to co
which ought to be

TINDAL C. J.
ment of performar
person. "*Accord*
ment," over-rides
and it would be a
the last member o
within the rule, th
of performance, if
averment he must

GASELEE J. I
to the provisions of

whole sentence, and applies to the whole, as it have done if it had been placed at the beginning. might have been some ground for doubt if those had been placed in the middle.

1832.
VARLEY v. MARTON.

ANQUET J. "*According to the provisions of the reement*" over-rides the whole averment of per- ce; it is not strictly formal, but the objection have been taken on special demurrer.

ERSON J. concurred.

Judgment for the Plaintiff.

BELTON *v.* HODGES.

Nov. 22.

Plaintiff having been declared a bankrupt, sued Defendant, his assignee, to try the validity of mmission. It appeared that the trading on which intiff was declared bankrupt was carried on, the ing creditor's debt incurred, the act of bank- committed, and the commission sued out, during intiff's infancy; and that the parties came to the this cause with the full knowledge on the part of endant, that the fact intended to be disputed was, the Plaintiff was an infant at the time of the and issuing the commission. All the evidence against the infancy was brought before the jury, nd that the Plaintiff was an infant at the time of mission; but no notice of an intention to dis- validity of the commission had been given under c. 19. s. 90. A verdict having, under these cir- cumstances,

A commission of bankrupt against an infant is void, and not merely voidable.

1832.

BELTON v. HODGES.

cumstances, been found for th
the Defendant to move to ente

Taddy Serjt. obtained a rule
ground that in a court of l
having been superseded by the
that, at all events, its validity
the Plaintiff in this action, for
scribed by 6 *G.* 4. *c.* 16. *s.* 90.
ever, had not been taken at th

Wilde Serjt., who shewed c
commission was absolutely voi
not contract a trading debt. I
bankrupt having petitioned to
on the ground of infancy, the
terfere, because he had held h
as an adult, but left the bank
law; whence it followed, that
proved, there would be a re
remedy could be no other that
to be void. And an infant i
puting his commission, even th
loss, have assisted his assigne
property. *Heane* v. *Rogers* (*b*)
being void to all intents, notice
cessary under sect. 90. 6 *G.* 4.
as in the present instance, the
try, and actually tried the fact

Taddy. The commission
absolutely void; and the Plain
to supersede it, could not sue h
not without notice of an intent

(*a*) 16 *Ves.* 265.

commission. If a deed executed by an infant voidable, *Zouch* v. *Parsons* (*a*), by the stronger his liability in respect of a trading debt must till he has done some act to disaffirm it. And v. *Harrison* (*b*), where an infant held himself n partnership with *J. S.*, and continued to act till within a short period of his coming of there was no proof of his doing any act as r after twenty-one, it was held, that it was his notify his disaffirmance of the partnership on at twenty-one; and as he had neglected to do he was responsible to persons who had trusted h goods subsequently to the infant's attaining ne, on the credit of the partnership. Here, no done to disaffirm the petitioning creditor's debt, ersede the commision; the merely bringing an gainst the assignee without notice to dispute the ion cannot be esteemed a disaffirmance. [*Tin-*. In *Rex* v. *Cole* (*c*), the defendant was in- r that, he being a bankrupt, and brought before missioners, refused to give them an account of s, &c. and at the trial pleaded that he was an the time of the debts contracted; and it was y *Holt* C. J., that a man could not be a bank- a debt contracted in his infancy, for that no be a bankrupt for debts which he was not o pay.] That was an indictment, and a minor civilly, though not criminally, responsible. In *Sidebotham* (*d*) it appears that Lord *Macclesd* held that a commission might issue against a Lord *Hardwicke*, indeed, superseded such a ion; but it may be thence inferred that till it erseded it was voidable only, not void. A com-

(*a*) 3 *Burr.* 1805.
(*b*) 5 *B. & Ald.* 147.
(*c*) 1 *Ld. Raymd.* 443.
(*d*) 1 *Atk.* 146.

1832.

BELTON v. HODGES.

mission of bankrupt is in the nature of a statute execution. If an infant does not plead his infancy in an action, he cannot afterwards discharge himself; so, if he does not take steps to supersede his commission, he affirms it. *Ex parte Moule* (*a*), *Ex parte Bass* (*b*), *Ex parte Abel* (*c*), and *Ex parte Cutten* (*d*), shew that it is a matter of discretion with a court of equity whether a commission shall be superseded or not.

At all events, in the absence of notice to dispute the commission, the proceedings under it are sufficient evidence to support it, even though they do not disclose a perfect petitioning creditor's debt. *Macbeath* v. *Coates*. (*e*)

Cur. adv. vult.

TINDAL C. J. This is an action brought by the Plaintiff, who has been declared a bankrupt, against the Defendant, the assignee under the commission issued against him, for the purpose of trying the validity of such commission. It appears in this case, that not only the petitioning creditor's debt was contracted by the Plaintiff, and the trading upon which he was declared bankrupt was carried on by him, and the act of bankruptcy committed during his infancy, but also the commission of bankrupt itself was issued out against him whilst he still continued an infant. Upon this short state of facts two questions arise, first, whether the commission of bankrupt is a valid commission in a court of law; and, secondly, whether the Plaintiff can dispute its validity against the assignee without giving notice under the ninetieth section of 6 *G.* 4. *c.* 16. That a commission of bankrupt issued against an infant would, under ordinary circumstances, be superseded upon the

(*a*) 14 *Ves.* 602.
(*b*) 4 *Madd.* 270.
(*c*) 1 *Jac. & W.* 499.
(*d*) *Buck.* 69.
(*e*) 4 *Bingh.* 34.

ground

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BELTON v. HODGES.

ground of infancy by the Lord Chancellor, has been held to be the law, at least since the case of *Ex parte Sidebotham* (*a*), where Lord *Hardwicke*, on superseding a commission on that ground, said, "Notwithstanding Lord *Macclesfield* held, in the case of one *Whitelock*, that an infant might be a bankrupt, yet it has been determined otherwise since." But the question before us is, whether, without applying to the Chancellor for a *supersedeas*, the commission may, under these circumstances, be held invalid by a court of law. And upon that point we are of opinion that the commission is altogether invalid. We are not called upon to consider whether a commission taken out against a person after his full age, upon a petitioning creditor's debt, a trading and an act of bankruptcy during his infancy, may, or may not be supported. In that case, the conduct and acts of the bankrupt after he attained his full age may have been such as to confirm the debt of the petitioning creditor, and the several contracts which he made in his trade, so as to enable him to be considered such a trader as might commit an act of bankruptcy. But this is a commission taken out against an infant upon a trading carried on, a debt contracted, and an act of bankruptcy committed during his nonage. The statute 6 *G.* 4. *c.* 16., after describing the particular callings and occupations which shall be considered to constitute a trading within the statute, proceeds to enact that *all such traders* who shall commit certain acts therein enumerated, shall be deemed to have thereby committed an act of bankruptcy. A *trading*, therefore, by the party at the time the act is committed, is one of the conditions upon which such act receives its character of an act of bankruptcy; and it is only against such a trader that the Chancellor has jurisdiction to issue the com-

(*a*) 1 *Atk.* 146.

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BELTON v. HODGES.

mission. But by the law of *Engla* because he cannot be made lia into by him in the course of t *Dyer*, 104 *b.* in marg.; 1 *M* And accordingly, in the case where the bankrupt applied t supersede the commission, on ing was during his infancy, Lo refused to supersede the com had obtained his certificate un trading, of a sort, had been during infancy;" and afterwa was enough to have authorized claim the right to try the fact o adult, which would support t case *Ex parte Watson* (*b*), whe that the commission against on the ground that he was un when it was issued, the Lord appeared in this case that the self forth to the world as an traded in that character, and siderable amount for two yea sion, he would make no orde to bring his action at law if h to do. Words which imply should be proved, there wou tainly there could be no rem the commission invalid. The "I consider him no more en sistance than a *feme covert* husband, and holds herself o tracts debts, is entitled to an Judges at common law, who

(*a*) 14 *Ves.* 602.

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BELTON v. HODGES.

cription to make the best she can of her plea of
re in any action brought against her; and con-
refuse to interfere so as to afford her any sum-
lief." The same appears from the case in 1 *Ves.*
4., where it is expressly stated by Lord *Eldon*,
a minor cannot be bankrupt;" and from the
O'Brien v. *Currie* (*a*), in which it was ruled by
tice *Burrough*, that a commission of bankrupt
against a minor is absolutely void. See also
n v. *Illingworth*. (*b*)
second point raised on the part of the Defendant
even if the commission cannot be supported by
of the infancy of the Plaintiff, still, that the evi-
as inadmissible, as no notice had been given
ne ninetieth section of 6 *G.* 4. *c.* 16. As to that
t is to be observed, that the parties came to
l of this cause with the full knowledge on the
the Defendant of the fact intended to be dis-
iz. whether the Plaintiff was an infant at the
the trading and the issuing the commission. All
dence for and against the infancy was brought
he jury, and the jury found that he was an infant.
e, therefore, where there was actual knowledge
oint in dispute, although no formal notice; where
wing of the objection, if a valid one, would go
er than to a new trial, in which the Court would
w the Plaintiff to give the formal notice; where,
notice was given, the same facts would by them-
e conclusive against the commission; and where
ection itself does not appear upon the Judge's
nd the parties do not agree between themselves
it was distinctly taken at the trial, we do not
selves called upon to give an opinion whether

(*a*) 2 *C. & P. N. P.* 283. (*b*) 2 *B. & C.* 826.

the case falls within th
rupt act or not. Upon
the rule for entering a

Crowfoot and Othe
a Bankrupt,

AN arbitrator, to wh
that *Streather*, be
employed by the Defen
the *Baptist College Cha*
Chapel and other buil
pleted in *July* 1830; a
there was due to *Str*
treasurer of the chap
work done and mate
respect of the building
not measured until a su
of balance due to the
tained before the 11th
December 1830, *Streat*
Isaac Solly and Sons,
addressed to the Defen
your paying to Messrs.
due to me for building
buildings at *Stepney*, an
ficient discharge to yo
On the same day *Solly*
the Defendant, enclos
which was as follows: '
an order from Mr. *Str*

1832.

CROWFOOT v. GURNEY.

him for building the chapel, &c. at *Stepney*; and ll feel obliged by your informing us when such e will be in course of payment. Requesting your tention to said order, we are, &c." To that letter efendant, on the 20th *December* 1830, sent the ng answer to *Solly* and Sons: "I have received tter, enclosing Mr. *Streather*'s, and shall be happy ke the payment to you instead of to him as ed; but I have not yet received the surveyor's and am therefore ignorant of the amount, and e at which he may direct it to be paid."

se letters were stamped with an agreement stamp. 21st *April* 1831, a commission of bankrupt was against *Streather*, under which commission the ffs were duly chosen assignees, and the bankrupt's were assigned to them previously to the time he notice hereinafter mentioned was given by the ffs to the Defendant. At the time of the bank- the balance of account due from Defendant in of the buildings, &c. was 528*l.* 4*s.* On the 11th 331, the Plaintiffs, as assignees under the com-, applied to the Defendant for payment of that , and gave him notice not to pay the same to *Solly* and Sons. On the 31st *May* 1831, *Solly* ns claimed from the Defendant the payment of balance, and gave him notice not to pay it to the ffs as such assignees. On the 10th *August* 1831, fendant paid the balance to *Solly* and Sons under emnity from them against the claim of the as- in respect of the balance. The action was t by the Plaintiffs as such assignees, to recover l sum of 528*l.* 4*s.*

n the above facts, the arbitrator was of opinion e Plaintiffs were not entitled to recover. But if urt should be of opinion that the Plaintiffs were

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in point of law entitled to 528*l.* 4*s.* from the Defenda awarded and determined tha and ordered and adjudged tl Plaintiffs the said sum of 528 after the Court should have so

The case having been appo a rule *nisi* obtained for setti award as adjudged that the recover,

Spankie Serjt. for the Plaint that the order given by *Streat* of exchange stamp; but the C there was no ground for con bill of exchange, *Spankie* ar was revokable by *Streather* if therefore, by operation of la ruptcy. As *Gurney*'s debt t *action*, and not assignable by no right to sue except by virt to give any effect to that asse for a sum ascertained and specified, there was nothing *ney*'s undertaking, and *Streat* indefinite an order at any ti paid. In *Gibson* v. *Minet* (*b* order on his bankers, direct from his private account 40(and the bankers accepted th such order was revocable, an(before payment made to *B.*

(*a*) See *Ex parte Alderson*, 1 *Madd.* 53. *Ex parte South*, 3 *Swanst.* 392. *Hodgson* v. *An-*

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CROWFOOT v. GURNEY.

[*Alderson* J. In *Smith* v. *Everett* (*a*) it was ruled s Commissioners *Eyre* and *Ashurst*, that an order noney out of a particular fund gave the party a lien thereon.] But here there was no adequate ation for the assignment, for upon *Gurney*'s re- o pay, *Solly* might still have had recourse to r; *Curon* v. *Chadley* (*b*); and *per Bayley* J. in v. *Walker* (*c*): and it has been expressly laid *Fairlie* v. *Denton* (*d*) and *Wilson* v. *Coupland* (*e*), nake such an assignment as this available, there a defined and ascertained debt due to the as- as well as an assignment agreed to by all the rties.

AL C. J. It appears to me that the assignees of r are not entitled to recover from the Defendant he circumstances stated on this award. A sum y was due from the Defendant *Gurney* to *Strea-* ne precise amount is not stated, but it may be d from the terms employed by *Streather*, that it ger than a debt due from *Streather* to *Solly*, which r desires *Gurney* to discharge; *Gurney* gives his an assent which, it may be observed, is wanting of the cases referred to. These circumstances to an equitable assignment of the debt due from to *Streather*; for *Solly* might have gone into a equity to compel a formal assignment, and no could have been given to such an application. was consideration enough for such an assignment, , from the time of the order, appears to have d from making any application to *Streather*, and looked to *Gurney* alone.

s been objected that such an assignment could

(*a*) 4 *Br. Ch. C.* 64.
(*b*) 3 *B. & C.* 591.
(*c*) 4 *B. & C.* 165.
(*d*) 8 *B. & C.* 395.
(*e*) 5 *B. & Ald.* 228.

not

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CROWFOOT v. GURNEY.

not take place except in res
tained amount. I cannot co
cause all that can be require
should not be larger than
assigning. Here the balar
Streather's bankruptcy. If
Streather was master of his o
as if it had been ascertaine
The transaction must be c
equitable assignment; and
the assignees must stand i
bankrupt, and the Defend
verdict.

GASELEE J. concurred.

BOSANQUET J. If *Solly*
equity, against *Streather* u
cannot recover. I am of o
in equity to claim a formal
fore, this rule must be disch

ALDERSON J. I am of the
v. *Anderson* (*a*), the order
soon as you have funds bel
Trinidad, I will thank you
the Commercial Banking
291*l.* 19*s.*, being the amou
favour of *R. Robertson*, Esq
advising me of the amount,
derson, having received his
indebted to me more than
delivered to Messrs. *Ande*
James Anderson, and they

(*a*) 3 B.

1832.

CROWFOO
v.
GURNEY

ny to pay to them according to the terms of the as soon as they should have funds of the Defendant d. It appeared that *Hodgson* afterwards gave an to another creditor, authorising *James Anderson* to such creditor the amount of the debt due to *Hodgson*; and *James Anderson* entered into an tion to pay the same to such creditor, but there clause annexed to the obligation, stating that it een alleged that a payment had been made by erson to *Hodgson*, on account of *James Anderson*, was declared, that should such payment be proved e been made, the amount should be deducted. reditor to whom that order was given demanded nt of the debt from *James Anderson*, on his arrival country, but the latter refused to pay it, on the l that his agents were liable to pay it to the ercial Banking Company, and the same was, in terwards paid to that company. The Court held, though a creditor had a right to insist on pay- o himself or to his appointee, yet, having once an order for the payment of his debt to a third , he had no right to revoke that order, provided vas a pledge by the person, to whom the authority ven, that he would pay the debt according to the ity. That case is decisive of the present. *Gurney* ed to pay, when the amount should be ascertained; nount was ascertained before *Streather* became pt; and, therefore, this rule must be

Discharged.

1692.

Nov. 22. WHITE, Assignee of CA
BARTLE

Defendant, an auctioneer, was employed by *C.*, a person embarrassed in circumstances, to sell his property; Defendant sold, and paid the proceeds to *C.*'s order: *C.* having shortly afterwards been declared insolvent, held, that the Defendant was not liable to *C.*'s assignee, though the Defendant, when he sold the property, was aware of the embarrassment.

ASSUMPSIT for money ha
of *Catling*, and upon an
before he petitioned the insolv
discharge, and also for money
use of the Plaintiff as *White*'s a

In *December* last, the Defen
employed by *Catling*, then
stances, to sell his household fu
the proceeds should be appli
debts. The Defendant accord
vertisement that the goods wou
of creditors, and the sale took

At the time of the sale, the
creditors, gave the Defendant
the proceeds, alleging that *Catli*
of bankruptcy.

The next day, *December* 28,
Catling, and sent him to gaol.

On the 17th of *February* foll
petition under the insolvent debt

On the 31st of *December* and
fendant, upon receiving an inden
paid the proceeds of the sale par
and partly to one of *Catling*'s cr
the usual amount for the expens
upon the Plaintiff sought to rec
proceeds in this action.

The learned Judge who tried
nonsuited the Plaintiff on this state

A rule *nisi* was obtained for s

1832.

WHITE v. BARTLETT.

on the ground that the Defendant, as appeared by his advertisement, having been privy to the embarrassed circumstances of *Catling*, the payment of the proceeds of the sale to *Catling*'s attorney was a fraud upon the creditors.

Jones Serjt. shewed cause. *Catling* had full dominion over his property till the filing of his petition on the 17th of *February*: the Defendant could not disclaim the title of his employer: had he done so, he would have been liable to *Catling* in an action for the proceeds of the sale. And the Defendant being employed merely as an auctioneer, the delivery of the goods to him for the purpose of sale, was not a fraudulent delivery within section 32. of the insolvent act, 7 *G.* 4. *c.* 57., which avoids transfers made by the insolvent to a creditor; enacting, that "if any prisoner who shall file his or her petition for his or her discharge under the act, shall before or after his or her imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal security for money, bond, bill, note, money, property, goods, or effects whatsoever, to any creditor or creditors, or to any person or persons, in trust for, or to or for the use, benefit, or advantage of any creditor or creditors; every such conveyance, assignment, transfer, charge, delivery, and making over, shall be deemed and is hereby declared to be fraudulent and void as against the provisional or other assignee or assignees of such prisoner appointed by this act: provided always, that no such conveyance, assignment, transfer, charge, delivery, or making over, shall be deemed fraudulent and void, unless made within three months before the commencement of such imprisonment, on with the view or intention by the party so conveying, assigning, transferring, charging, delivering, or making over,

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WHITE v. BARTLETT.

over, of petitioning the
charge from custody und

There is no evidence
the Defendant was actin,
the purpose of defeating

Bompas Serjt. in supp(
having notice of *White*'s
the sale of the goods, a
proceeds within the me
Either he was such tru
agent for *Catling*, he is
himself, and therefore li
tarily paid to *Catling*'s
can elude this responsi
may always, by a similar
their creditors at large.

TINDAL C. J. I thi
charged. And though i
sequence of our decision
of insolvents, that conc
circumstanced like the p
improperly paid by an in
may not be recovered by
here is, whether *this* c
capacity of an agent, an
can be called on a seco
afterwards becoming an
Defendant's employer w
till the month of *Februar*
in the insolvent debtors'
not be predicated of hi
nearly two months before
sold some of his effects;
and, subject to some ded

1832.

WHITE v. BARTLETT.

ployer, paid over the proceeds in *December* and *January* to persons appointed by him. It is contended, that the Defendant ought not to have done this after the notice which he had of his employer's circumstances; but the Defendant acted merely as agent, and if he had refused to account to his principal, what answer could he have given to an action for money had and received? As to the 32d section of 7 *G.* 4. *c.* 57., it applies only to persons of two descriptions, creditors, and trustees for creditors, — the defendant was neither. It is not pretended he was a creditor, and in order to render him a trustee, he should have been at least apprized of the trust. The nonsuit therefore was right, and this rule must be discharged.

GASELEE J. I am of opinion there is no ground for setting aside this nonsuit. There is no evidence that the transaction was fraudulent; on the contrary, it appears to have been the intention of *Catling* at the time, to divide among his creditors the proceeds of his property, and up to the 17th of *February* he had full dominion over it.

BOSANQUET J. I am also of opinion that the nonsuit ought not to be set aside, for the property claimed was not vested in the Plaintiff at the time of *Catling*'s filing his petition. While the property was yet vested in *Catling*, he employed the Defendant, as his agent, to dispose of it by auction. It was to be sold for the benefit of creditors; but they were no parties to any arrangement to that effect, nor was the defendant their trustee: he therefore was bound to account to his employer. But it is urged that the defendant, though acting as an auctioneer, was apprized of the situation in which *Catling* stood, and therefore must be deemed to have assisted him in a voluntary preference of the creditor

1832.

WHITE v. BARTLETT.

creditor to whom it is al
has been paid; the Def
to what extent *Catling*
he would take the bene
neither could he have
sued him for money ha

ALDERSON J. I am
does not involve the
counsel for the Plaintiff
whether *Catling*'s assigr
question, as, whether h
fendant. Now the D
auctioneer while *Catlin*
and as agent, he was b
who employed him.
pointee, was the payme
agent, and the mere int
unless he be caught wit

(a) *Alderson J.* referred
the following case, argued in
Common Pleas of *Lancas*

HARDMA

THE Defendant was emplo
by the Plaintiff to sell, as a
tioneer, certain goods then in
Plaintiff's possession. Before
sale a notice was given to
Defendant by the assignees
an insolvent, that the goods w
their property as such assign
and that they had been fra
ulently removed by collusion
tween the Plaintiff and the
solvent. The Defendant, a
that notice, sold the prope
and rendered an account of

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WHITE v. BARTLETT.

on of the goods by a
etween him and the in-
; and upon that state of
ere directed by *Patteson* J.
a verdict for the Defend-
th liberty to the Plaintiff
e to enter a verdict for
ount of the sale in case
rt should be of opinion
was not competent for
efendant, in the peculiar
n in which he stood to
intiff, to set up the right
assignees on the present
n.

btman accordingly moved
r a verdict for the Plaintiff,
ground that an agent
ccount to his principal,
not set up the *jus tertii*
action by his principal
him. He relied on *Nic-*
v. *Knowles* (*a*), *Meyler*
patrick (*b*), *Stonard* v.
(*c*), *Dixon* v. *Hamond* (*d*),
v. *Ogilby* (*e*), *Gosling*
ie. (*g*) A rule *nisi* having
anted,

Pollock and *Tomlinson*
cause. The argument
jus tertii does not arise
as in the present case,
have found in effect that
intiff had no property in
ods of which he claims
oduce. The Plaintiff has
perty in goods which he
d by fraud. If he is
ed to claim the goods, he
lly estopped to claim the
e of them; for the produce
to the rightful owner;
v. *Plumer*. (*b*)

Wightman. As against the Plaintiff, the Defendant is estopped by his own act to set up the title of the assignees, for he rendered to the Plaintiff an account of the sales after he had received notice of the claim of the assignees.

Cur. adv. vult.

ALDERSON J. We have heard this case argued, and have considered it; and we think the direction of the learned Judge was right, and that the verdict ought to stand. There are many authorities which were cited for the Plaintiff, which establish, no doubt, that an agent must account to his principal, and cannot set up the *jus tertii* in an action by his principal against him. The case of *Nickolson* v. *Knowles* is a distinct authority shewing that an agent to receive for the use of another cannot by notice from a third person be converted into an implied trustee; and that his possession is the possession of his principal. The same principle which depends on the relation of the parties as agent and principal was laid down by the Court of King's Bench in *Dixon* v. *Hamond*; by the Court of Common Pleas in *Gosling* v. *Birnie*; and by the Court of Exchequer in *Roberts* v. *Ogilby*. But we think all these cases are distinguishable from the present, upon the ground that here the jury have found that the Plaintiff's possession of the goods arose out of a fraud concerted between him and the insolvent.

(*a*) 5 *Mad.* 47.
(*b*) 6 *Mad.* 360.
(*c*) 2 *Campb.* 344.
(*d*) 2 *B.* & *Ald.* 310.
(*e*) 9 *Price*, 269.
(*g*) 7 *Bingh.* 339.
(*b*) 3 *M.* & *S.* 562.

1832.

WHITE v. BARTLETT.

It is clear that if the insolvent had put the goods into the hands of the Defendant for sale, his assignees would have stepped in and claimed the produce from the Defendant, and that the insolvent could not have maintained this action after such claim. And we think that the Plaintiff, who takes the goods by a fraud between him and the insolvent, can be in no better situation than the insolvent himself.

On this ground, therefore, we think the verdict in this case may well stand consistently with the cases cited on behalf of the Plaintiff, and the Defendant has the right to set up the title of the

Nov. 22.

BERRIMAN v.

The property in trees is in the landlord; the property in bushes is in the tenant, even where they are cut down by a stranger.

AT the last *York* assizes, be had a verdict, with nomi of trespass, on the count *de bo* Judge reserving to the Defend a nonsuit upon the following f

The Defendant being in the ing a field let by the Plaintiff t term of years, requested *W* between the two properties. Defendant lopped the fence cuttings to *Wardell*, the Plain the trial, that according to the believed he was entitled to th by the Defendant in an unskil

1832.

BERRIMAN v. PEACOCK.

e thought it a good job, and that the fence was the for it.

s Serjt. obtained a rule *nisi* to set aside the and enter a nonsuit, upon the authority of rd resolution in *Herlakenden's* case (*a*), — "That s, being timber, are blown down by the wind, sor shall have them (for they are part of his in- ce), and not the tenant for life or tenant for years, they be dotards, without any timber in them, the for life or tenant for years shall have them," — and *on* v. *Patch* (*b*), where a lessor, during the term, having wn some oak pollards growing upon the demised es, which were unfit for timber, it was held, that nant for life or years would have been entitled to f they had been blown down, and was entitled to afruct of them during the term, the lessor could wrongfully severing them, acquire any right to and consequently he or his vendee could not in trespass against the tenant for taking them.

pas Serjt. shewed cause. In *Channon* v. *Patch*, sor himself had cut down the pollards, which the lessee's term he had no right to do. To lowed him, therefore, under such circumstances, n a property in them, would be to enable him advantage of his own wrong; but that decision incompatible with the lessor's having an imme- roperty in such things when they are severed ne soil by the act of a stranger. For the re- in *Herlakenden's* case must be considered to nly to the tenants *botes*. To the extent of what required for *housebote*, *firebote*, and the like, the may have a property in underwoods; but, as to

(*a*) 4 *Co. Rep.* 62. (*b*) 5 *B. & C.* 897.

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the residue, the property must is not pretended that the cutti quired for *botes*, and the wro could not vest in the tenant wh was clearly the property of the

Jones, in support of his rule, cited, and referred to *Com. L* life, or years, has only a specia the fruit and shade of timber annexed to land, 4 *Co.* 62 b And he has a general prop trees, &c., which are not timt And, therefore, if the lessee ct not timber, the lessee shall ha &c., which have no timber in by the wind, &c., the lessee s So, if a man cut down timber-t trespass in respect of the loss though the lessor, or any one mand, cut them. 11 *Co.* 48 b.

TINDAL C. J. This case re ation as if it had been an a because what the Defendant tenant, who carried away the c a good job, and that the fence is clear that, under such circun lie for the tenant against *Peac* over refinement to say that, bec of a fence has been cut than th the landlord has a right to cla complaint was rather as to the the cutting; but the question perty in the cuttings belonged according to the old authorities

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is in the landlord, and the general property in s is in the tenant; although, if he exceeds his as by grubbing up or destroying fences, he may ble to an action of waste. We should be in- ing a distinction never drawn before, if we were ide that, when a tenant cuts rather more than he the property in bushes so cut passes to the land- The rule for entering a nonsuit, therefore, must de absolute.

ELEE J. In *Dowglas* v. *Kendal* (*a*), it was laid hat "the lord may not cut down any thorns, nor any other to cut them down; for the defendant beth to have all the thorns growing upon the and that prescription excluded the lord from any thorns there; but if he had claimed common *ers* only, then, if the lord had first cut down the the commoner might not take them; and if he t down all the thorns, the commoner might have assise." The tenant has the general property in tings of a hedge, whoever cuts it. If, by his per-, a stranger cuts improperly, so as to damage the that may give the landlord a ground of action case, but the property in the cuttings is in the

ANQUET J. I am of the same opinion. I do not t clear that the cutting in this case is to be con- the act of the tenant; but that is not material, ether it were the act of a tenant or of a stranger, perty in the cuttings does not pass to the land- *Herlakenden's* case is an express authority on the , and Chief Baron *Comyns*, after referring to Reports, adds, "and, therefore, if the lessee

(*a*) *Cro. Jac.* 256.

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cuts down hedges, or trees, not timber, the lessee shall have them."

ALDERSON J. concurring, the rule was made Absolute.

Nov. 22.

SYLVESTER and Another *v.* WEBSTER and Another.

An attorney must deliver his bill under 2 *G.* 2. *c.* 23. before suing to recover charges for business done at quarter sessions.

ASSUMPSIT for work and labour as attornies. There was a charge in the Plaintiffs' bill for attending from day to day at the Sessions House at *Clerkenwell*, to see whether an indictment had been found against a party, for whose appearance at the sessions the Defendants had become bail; and another charge for attendance at the clerk of the peace's office, after the sessions were over, in order to get the defendants' recognizances discharged, which recognizances were discharged on the payment of a fee to the clerk of the peace.

Save these items, there were none which could be called charges for business done in a court, and the Plaintiffs omitted to deliver a bill a month before the commencement of their action. At the trial before *Tindal* C. J. a verdict was taken for the Plaintiffs, with leave for the Defendants to move to enter a nonsuit instead, on the ground that the Plaintiffs' bill was open to taxation under 2 *G.* 2. *c.* 23. *s.* 23., and that, therefore, it should have been delivered to the Defendants in the ordinary way, a month before the action.

Taddy

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Taddy Serjt. having obtained a rule *nisi* accordingly, on the authority of *Ex parte Williams* (*a*), and *Clarke* v. *Donovan* (*b*),

Wilde and *Andrews* Serjts. shewed cause. The Plaintiffs were not bound to deliver a bill under the statute, unless for work performed by them in the character of attornies in one of the courts indicated by the statute. But mere attendance at the quarter sessions, to see whether an indictment has been found, is not work done in a court, or done in the character of an attorney. The attendance of any lay person would have answered the purpose as well. Still less can attendance at the office of the clerk of the peace be called work done in a court. And the court of quarter sessions is not one of the courts to which the statute, 2 *G.* 2. *c.* 23., was meant to apply. The object of the statute in requiring the delivery of the bill, was in order to having it taxed, and it would be useless to require such delivery in cases where the bill cannot be taxed; but from the latter part of sect. 23. 2 *G.* 2. c. 23. it may be inferred, that the legislature only contemplated taxation for business done in a superior court; for the bill is to be taxed upon the application to the Lord Chancellor or Master of the Rolls, "or unto any of the courts aforesaid, or unto a *judge or baron* of any of the said courts respectively," in which the business contained in such bill shall have been transacted. *Clarke* v. *Donovan* was decided on the authority of *Ex parte Williams*, in which there was no argument, though there were conflicting statements as to the practice of taxing bills for business done at quarter sessions. But in *Stephenson* v. *Taylor* (*c*),

(*a*) 4 *T. R.* 496.
(*b*) 5 *T. R.* 694.
(*c*) In a note to *Ex parte Williams*, 4 *T. R.* 142.

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in which the bill might have been taxed; but the court of quarter sessions does not tax bills; nor the Court of King's Bench, bills incurred at the quarter sessions, unless *Ex parte Williams* be considered an authority.

Taddy. In *Clarke* v. *Donovan*, Lord *Kenyon* said, "there was no reason for restraining the general words of the first part of the clause, which requires an attorney to deliver his bill one month before he commences any action for the recovery of the amount." And that case has never been impugned. So in *Smith* v. *Taylor* (*a*), *Tindal* C. J. said, "seeing that the act is remedial, it is better to draw in a case on the extreme verge of the rule, than to leave it without." The delivery of a bill for all charges of attornies and solicitors concerning their clients or masters' suits which they have for them, subscribed with their own hand and names, before such time as they or any of them shall charge their clients with any fees or charges, was first required by 3 *Jac.* 1. c. 7. which recites, "That through the abuse of sundry attornies and solicitors, by charging their clients with excessive fees and other unnecessary demands, such as were not, nor ought by them to have been employed or demanded, the subjects grow to be overmuch burthened, and the practice of the just and honest serjeant and councillor at law greatly slandered." And it is consonant to the uniform spirit of the legislature to give the most extensive protection to suitors.

Cur. adv. vult.

TINDAL C. J. The point reserved in this case was, whether the Plaintiffs ought to have delivered their bill for business done, signed by themselves, one month before the commencement of the suit. The Plaintiffs

(*a*) 7 *Bingh.* 262.

contend

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contend that the statute 2 *G.* 2. *c.* 23. *s.* 23. does not apply to the case of business done at the quarter sessions; and even if it does apply, that there is no charge for such business in the present bill.

With respect to the second point however, it appeared upon the evidence that the Plaintiffs made a charge for attending from day to day at the sessions house at *Clerkenwell*, to see whether an indictment had been found against the party for whose apearance at the sessions the Defendants had become bail; and another charge, for attendance at the clerk of the peace's office after the sessions were over in order to get the recognizances discharged, which were discharged accordingly, on the payment of a fee to the clerk of the peace. And this latter charge appears to us, at all events, to be a charge for business done at the quarter sessions; for the discharge of the recognizance must be taken to be the act of the Court who alone have the authority to give such discharge, though in fact it is handed over to the party by the clerk of the peace after the sessions have terminated. The only question therefore is, whether business done at the quarter sessions is within the meaning of the statute? This was so held in two cases, *Ex parte Williams* (*a*), where the Court, after enquiry made, reversed their former decision; and *Clarke* v. *Donovan* (*b*), where the Court of King's Bench adhered to the decision last referred to, saying "there was no reason for restraining the general words of the first part of the clause, which requires an attorney to deliver his bill one month before he commences any action for the recovery of the amount." These decisions which have been constantly acted on as authorities for so long a period, ought not to be overturned, unless the Court can see most clearly that such construction is wrong; and we

(*a*) 4 *T. R.* 496. (*b*) 5 *T. R.* 694.

cannot

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cannot arrive at such conclusion. It is an additional argument in support of the construction which they give to the statute 2 *G.* 2. that by the subsequent statute 22 *G.* 2. *c.* 46. *s.* 12. it is enacted "that no person whatsoever shall act as an attorney at any general or quarter sessions of the peace for any county, &c. within the kingdom, either with respect to matters of a criminal or civil nature, unless such person shall have been admitted an attorney of one of His Majesty's courts of record at *Westminster*, and duly enrolled pursuant to the act 2 *G.* 2." Construing the two statutes, therefore, as made in *pari materiâ*, there seems to be no reason why the action by the very same person to recover fees for business done in the court of quarter sessions should not be considered as subject to the same law as the action "for fees charges and disbursements at law or in equity" are expressly subjected to by the statute 2 *G.* 2. We therefore think the rule for entering a nonsuit should be made absolute.

Rule absolute.

BELL and HEAD *v.* NIXON and DAVISON.

Nov. 23.

THIS was an action of assumpsit brought by the Plaintiffs, as clerks to the trustees appointed by virtue of an act of parliament passed in the 7 *G.* 4. *c.* 74. for making and maintaining a turnpike road leading out of the *Alston* turnpike road at *Branch End*, in the county of *Northumberland*, through *Calton Allindale* town and *Allen Heads* in *Cow's Hill*, in the county of *Durham*, against the Defendants, for the tolls arising from certain toll-gates upon that road.

Where two persons fill the office of clerk to the trustees of a turnpike road, both must join in executing a contract on the part of the trustees, under 3 *G.* 4. *c.* 126. *s.* 57.

The

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The declaration was framed upon a contract or agreement made between the trustees, by *Head* their clerk, and the Defendants. The Defendant *Davison* was surety for *Nixon*. At the trial before *James Parke* J. last summer assizes, a verdict was found for the Plaintiffs, with leave for the Defendant *Davison* to move to set it aside and enter a nonsuit, upon the ground that the agreement should have been signed by both the Plaintiffs. By the 3 *G.* 4. *c.* 126. *s.* 57., under which the trustees named in the local act were directed to proceed, it is enacted, "that all contracts signed by the trustees and commissioners letting such tolls, or any two or more of them, or by their clerk or treasurer, shall be good, valid, and effectual," &c. It was contended at the trial, that by the words "their clerk," were meant the persons filling the office of "their clerk," and that inasmuch as both the Plaintiffs filled that office, it was necessary they should both have signed the agreement. The declaration originally stated the agreement to have been made by the Plaintiffs as clerks, &c. But that variance was amended by the judge at the trial.

Merewether Serjt., having obtained a rule *nisi* to enter a nonsuit,

Spankie Serjt., who shewed cause, contended that the trustees having, under *s.* 74. of 3 *G.* 4. *c.* 126., authority to sue in the name of their clerk *or clerks*, the contract must be deemed equally binding whether executed by a single clerk or many, otherwise the commissioners would not have been empowered to sue by a single clerk. If twenty clerks were required for an extensive line of road, it would be extremely inconvenient that every contract should be signed by all of them. Besides, the signature of one might be taken to be the signature of all, just as the execution of a contract by one of the members of a

firm

firm would bind all the others. But in the present case, the lessee having enjoyed the tolls under the contract, would have been equally liable to the commissioners if it had not been signed by any one on their part; so that the signing by either of the clerks was immaterial, especially after verdict.

Merewether. This contract was entered into under a statutory power, and in order to make it binding on a surety, the power should have been strictly pursued. It was, no doubt, competent to the trustees to have appointed only one clerk, but they having in fact appointed two, the two constitute one agent, and must join in any act to bind the trustees. The object probably was, that each should be a check on the other, or at all events, that the trustees should have the benefit of their combined judgment; the two together, therefore, constituted the trustees' clerk, and not one singly. Now, where a power is granted to two, or an office is executed by two jointly, both must concur in an act to render it legal. Thus, in Auditor *Curle*'s case (*a*), *William Curle* and *Walter Tooke* having been appointed auditor of the Court of Wards, Lord *Coke* says, "When *Walter Tooke* died, then *William Curle* remained one of the persons, &c. and the king might add another to him, and until another is added his voice is suspended, as in the case of 14 *H.* 4. 35. a., if a writ issue to the sheriffs of *London*, and one of them dies, the other cannot execute the writ, because his power is suspended until he has a companion chosen him."

In *Salter* v. *Grosvenor* (*b*), it was held, that if an aggregate corporation consist of two bailiffs and burgesses, &c. the two bailiffs make but one officer, and if

(*a*) 11 *Rep.* 5. (*b*) 8 *Mod.* 304.

a lease

or by the act of such trustee, commissioner, clerk *or clerks*, or any of them, without the consent of the said trustees or commissioners; but that any one of such trustees or commissioners, or clerk *or clerks* for the time being to the said trustees or commissioners, shall always be deemed to be the plaintiff or plaintiffs, defendant or defendants (as the case may be), in every such action or suit."

How are we to say, that if trustees have appointed two clerks, perhaps for the benefit of having their united judgment, the two are not to be parties to a contract which is to bind the trustees? It is like the case where two execute the office of sheriff or bailiff. It seems to me, therefore, that as the agreement was entered into by one who was not singly but jointly the clerk of the trustees, they have not pursued the authority vested in them by the act, and that this rule must be made absolute.

The other Judges concurred, and the rule was made Absolute.

NEWARK Vouchee.

Nov. 23.

THE vouchee in this recovery, who was the son of a peer, was described in the *dedimus* and acknowledgment as "*Charles Henry Pierrepoint*, commonly called Lord Viscount *Newark*;" and he had signed the acknowledgment, "*Newark*."

A recovery suffered by the son of a peer may pass, though the acknowledgment be signed with his name of courtesy, and not with his true name, provided he be described on the record as "*commonly called* lord, &c."

The Court having, in the case of *Tatton* demandant, *Grey* vouchee (*a*), refused to allow a recovery to pass, on the ground that the acknowledgment had been signed by the son of a peer, with his name of courtesy, and not with his true name,

(*a*) 2 *Bingh.* 313.

Bompas

Bompas Serjt., who moved that the present recovery ght pass, distinguished it from that, by the circumnce, that here the record described the vouchee as *ommonly called* Lord *Newark;*" an explanation which l not appear upon the documents in *Tatton* demand-, *Grey* vouchee.

But *the Court*, referring to another report of that case, d, it appeared there, not only that the documents scribed *George Harry Grey*, Esq. as "*commonly called* rd *Grey*," but that that expression was adverted to the judgment of the court. If the present case could ve been distinguished from that, which appeared a rsh decision, they would have allowed the recovery to is.

Bompas argued the propriety of a reconsideration of point, and dwelt upon the hardship of compelling ord-by-courtesy to sign his name as a common person. t,

The *Court* adverted to the general inconvenience asioned by reversing decisions on matters of prac-, and *Bompas*

Took nothing.

Nov. 24. This day *Tindal* C. J. said, the Court, on examining the record in *Tatton* demandant, *Grey* ichee, found, that none of the documents described *orge Harry Grey* as "*commonly called* Lord *Grey*." e present case therefore being distinguishable in that pect, they ordered that

The recovery do pass.

1832.

JACKSON, Demandant; WARDE and Wife, Conusees.

Nov. 24.

A fine may be levied by a trustee, substituted for a missing trustee, under 6 *G.* 4. *c.* 74. *s.* 5.

UPON the occasion of a conveyance required on the part of the trustee of one *Wilkins*, it was found that the trustee had been dead ever since the year 1797, and that his heir, a female, had married one *Warde*, a strolling player, many years ago, and had never been heard of since.

Upon this, the Chancellor, under the authority of 6 *G.* 4. *c.* 74. *s.* 5. had substituted *Joseph Maberly* to join in the conveyance instead of *Warde* and his wife, and

Taddy Serjt. now moved, that, under these circumstances, this fine might be levied by *Maberly* instead of *Warde* and his wife, assuming that a fine might be levied, under the authority given by the above statute to the substituted trustee, to *convey* and *assure*; as was the practice in the case of infant trustees empowered to convey and assure under 7 *Ann.* *c.* 19. 3 *Atk.* 164. 479. 559.

TINDAL C. J. We do not profess to investigate the facts, but proceed on the order of the Chancellor.

Fiat.

Nov. 24.

MANESTY *v.* STEVENS.

The bail are discharged if a Plaintiff on general process declares as executor.

A RULE *nisi* had been obtained for entering an *exoneretur* on the bail-piece, on the ground that the process and affidavit to hold to bail were general, and the declaration special; viz. by the Plaintiff *as executrix*.

Jones Serjt. shewed cause. It is clear, from the authorities both in the King's Bench and this Court, that such a variance is no ground for setting aside the proceedings. *Lloyd* v. *Williams* (*a*), *Weavers Company* v. *Forrest* (*b*), *Watson* v. *Pilling* (*c*), *Rogers* v. *Jenkins* (*d*). The distinction is between the cases where a process is general, and the declaration special, and where the process is special and declaration general; for which latter variance the proceedings will be set aside; *Douglas* v. *Irlam* (*e*), *Canning* v. *Davis* (*g*). It was once, indeed, held, that although the proceedings would not be set aside in case the process was general, and declaration special, yet the bail would be discharged. But in *Ashworth* v. *Ryal* (*h*), it has been expressly decided that such a variance does not operate in discharge of the bail.

Wilde Serjt. in support of the rule. The decisions on the subject of setting aside proceedings for irregularity do not apply to motions in discharge of bail. And the case of *Ashworth* v. *Ryal* is met by the case of *Hally* v. *Tipping* (*i*), in this court, where it was held

(*a*) 3 *Wils.* 141. 2 *W. Bl.* 722.
(*b*) 2 *Str.* 1232.
(*c*) 3 *B. & B.* 4.
(*d*) 1 *B. & P.* 383.
(*e*) 8 *T. R.* 416.
(*g*) 4 *Burr.* 2417.
(*h*) 1 *B. & Adol.* 19.
(*i*) 3 *Wils.* 61.

that

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that the Plaintiff should lose his bail, where he declared differently from his writ. And the practice established by that case, which has never been overruled, was recognised in *Turing* v. *Jones* (*a*) and *Douglas* v. *Irlam*, as being the practice of the Court of King's Bench. That agrees with the principle acted on upon other occasions. Thus if a plaintiff arrest a defendant upon a bill of exchange, he may declare on the common money counts, but the bail are entitled to be discharged for the variance. The rules, therefore, as to setting aside proceedings, and as to the discharge of bail, are parallel, and not inconsistent with each other. In *Marzetti* v. *De Jouffroy* (*b*), Lord *Tenterden* says: "With regard to the objection that the affidavit shews a cause of action in the representative character, and the process does not describe the Plaintiff in that character, I think the case falls within the established rule, that the addition of the representative character is not necessary in the process. If, when the plaintiff declares, he should set out a cause of action different from that which appears in the affidavit of debt, the defendant, or his bail, can apply to the Court for relief."

It is probable that, in *Ashworth* v. *Ryal*, the distinction between the two rules was not accurately kept in view.

Cur. adv. vult.

TINDAL C. J. In this case a rule has been obtained to enter an *exoneretur* on the bail-piece, on the ground of a variance between the declaration and the process, the Plaintiff having declared in the character of executrix, and having arrested the Defendant in her general capacity.

There is some conflict in the cases; but the Court are

(*a*) 5 *T. R.* 402. (*b*) *Dowl. Pr. Cases*, 41.

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of opinion that the bail are entitled to an *exoneretur*, where the delaration is on a cause of action distinct from that disclosed by the process, as here, where the process is general and the declaration is particular, in the Plaintiff's character of executrix. The variance is not such as the Defendant could avail himself of, but we think the bail are entitled to do so.

Rule absolute.

Nov. 24.

VANSANDAU and TINDALE *v.* BROWNE.

VANSANDAU and BROWN *v.* BROWNE.

An attorney is not compelled to proceed to the end of a suit in order to be entitled to his costs, but may, upon reasonable cause and reasonable notice, abandon the conduct of the suit, and in such case may recover his costs for the period during which he was employed.

ASSUMPSIT for work and labour by Plaintiffs as attornies. The Defendant pleaded in each action the general issue. At the trial before *Gaselee* J., *London* sittings after last *Hilary* term, a verdict by consent was found in the first action for Plaintiffs, with 64*l.* 1*s.* 2*d.* damages; and in the second for 73*l.* 2*s.* 4*d.*, subject to the opinion of the Court on the following case: —

The first-named Plaintiffs, at the time the debt for which the first action was brought was contracted, were attornies in co-partnership together, and were retained and employed by the Defendant to defend an action brought against him by *Carr*, *Dodgson*, and Co. That action was commenced in *April* 1826; and in *Michaelmas* term of that year final judgment was obtained thereon by *Carr*, *Dodgson*, and Co. against the Defendant. The amount of the first-named Plaintiffs' bill for defending that action, and for a motion made for a new trial, was 87*l.* 10*s.* 10*d.* On the 9th of *November* 1826 the first-named Plaintiffs were advised by counsel

to

to apply for relief to a court of equity, in order to prevent execution from being issued on the judgment. Afterwards, and by the consent and direction of the Defendant, a bill was filed in Chancery against *Carr*, *Dodgson*, and Co. for the purpose of obtaining relief from the judgment, and the first-named Plaintiffs continued to conduct such suit until *Easter* term 1828, at which time the same Plaintiffs dissolved their co-partnership; and at the time of the dissolution the amount of their bill in respect of the proceedings in Chancery was 176*l.* 10*s.* 4*d.* over and above the before-mentioned sum of 87*l.* 10*s.* 10*d.*, the particulars of which the same Plaintiffs delivered in due time before these actions were brought. The Chancery suit still remains undetermined; but on the 15th of *May* 1830, an order or decree was made by the Master of the Rolls, whereby he directed a case to be submitted for the opinion of this Court, and that case has not yet been argued. About the month of *April* 1828 the Defendant paid the first-named Plaintiffs, on account of their bill, 200*l.*

The second-named Plaintiffs, *Vansandau* and *Brown*, entered into partnership as attornies in *February* 1829, and from that period to the present conducted the Chancery suit on behalf of the Defendant, and with his knowledge and consent.

There were letters from the Defendant of *June* 1827, *October* 1827, and *January* 1828, soliciting indulgence in respect of the Plaintiffs' demands; and one of *March* 1828, promising payment of the balance claimed in the first action, in a few days. In *June* 1828, *Vansandau* apprised the Defendant that *Tindale* had quitted the firm, and demanding payment of the balance still due, said he had no motive for exertion in the Chancery suit, *Browne* v. *Carr*, till it was paid. In *May* 1830 *Vansandau*, complaining that the old balance was still unpaid, wrote to say he would make no further cash payments in the

Chancery suit. In *August* and *September* 1830 *Vansandau* threatened to arrest Defendant for the balance still unpaid, and called on him to pay the costs already incurred in the Chancery suit, if he did not choose to proceed with it. The money not having been paid, *Vansandau* apprised the Plaintiff in *October* 1830, that he had commenced actions against him, and that in the second action against him, which he had instituted in the name of *Vansandau* and *Brown*, he would seek to recover the full amount of business done after the determination of the partnership of *Vansandau* and *Tindale*, both as regarded what was due to himself individually as also that which was due to the partnership of *Vansandau* and *Brown*. If the Defendant did not assent to that, he, *Vansandau*, would bring a third action against him in the name of himself individually.

The Plaintiffs' bills were delivered to the Defendant a month before the action. In the first action they were signed by *Vansandau* and *Tindale*; in the second by *Vansandau* and *Brown*. None of the charges were subsequent to *April* 1830, and the present actions were commenced in *October* following.

Taddy Serjt. for the Plaintiffs. The principal objection to be advanced on the part of the Defendant against the Plaintiffs' claim is, that this action is premature, and that an attorney cannot sue for his costs till the proceedings which he has been retained to conduct have received their judicial determination. But such a principle would operate as a great discouragement to the attainment of justice by the assistance of professional men; and it has been expressly laid down, that an attorney may refuse to proceed if he is not furnished with money to carry on a suit. In *Rowson* v. *Earle* (*a*),

(*a*) 1 *Mo. & Mal.* 538.

where

where it was held that an attorney who had given notice that he would not go on with a cause in the Court of Chancery without being supplied with money, had a right to desist from it, and might recover for the work done up to that time, Lord *Tenterden* said, "It is not to be expected that any attorney will carry on a cause of an indefinite length unless he is furnished with funds so to do." The case reported in 1 *Sid.* 31. seems opposed to this, but the facts are not stated, and the case is of doubtful authority.

Joues Serjt. for the Defendant. Under the circumstances stated in the case, it was not competent for the Plaintiffs to maintain an action for their bill of costs, until the suit in which the costs arose was determined: the obligation being founded on the retainer, which continues until the end of the cause, or a countermand: it is against the policy of the law to permit a party to recover in a contract *pro ratâ*; and an attorney always has a lien on the proceeds of the suit: *Com. Dig. Atty.* (B) 910., *Mulloy* v. *Backer* (*a*), *Drapers' Company* v. *Davis* (*b*), *Tabrum* v. *Horn.* (*c*) The Plaintiffs, therefore, ought not to have sued so soon, or have split their demand into two actions. The contract entered into to conduct the Defendant's suit was an entire contract, and the Defendant's right to have it treated as such, cannot be altered by any change of partnership, which is an act of the Plaintiff's unconnected with the original contract. If the attorney be allowed to sue for his costs at any time before the business he is engaged in is concluded, no line can be drawn, and the client may be harassed by multiplied actions for the costs of a single law-suit. In *Mordecai* v. *Solomon* (*d*), where it appeared that the plain-

(*a*) 5 *East*, 316.
(*b*) 2 *Atk.* 295.
(*c*) *M.* & *R.* 228.
(*d*) *Sayer*, 172.

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tiff's brother had frequently employed an attorney, and had always paid him well; that he had undertaken to pay the attorney in the cause, but had not brought some money applied for by the attorney; that judgment of *non pros* was signed for not making up the issue; and that the Plaintiff was in prison for not paying the costs of that judgment; — the Court, upon a rule to shew cause why the Plaintiff's attorney should not pay the costs of the judgment of *non pros*, and the costs of that application, ordered costs to be paid by the attorney in the cause. And, *per Curiam*, "when an attorney has commenced a suit upon the credit of a client, he ought to proceed in it, although the client do not bring him money every time he applies for it."

In *Cresswell* v. *Byron* (*a*) Lord *Eldon* says, "The client may discharge his solicitor; but I do not know that a solicitor, whatever may be his reasons for declining to proceed, can claim a lien, if he does not carry the business through a hearing. If that could take place, there might be numerous claims of lien. The Court of Common Pleas, when I was there, held that an attorney, having quitted his client before trial, could not bring an action for his bill."

In *Rowson* v. *Earle* there had been a decree, and the attorney had given up his papers and lien before making his demand.

Here, too, the signature of the bill in the second action was insufficient. The charges incurred during the period in which *Vansandau* carried on the business alone, ought to have formed a separate bill authenticated by his separate signature.

TINDAL C. J. I think the Plaintiffs are entitled to recover the taxed costs, for which they have sued the

(*a*) 14 *Ves.* 271.

Defendant

Defendant in these two actions, with the exception of the charges which accrued in the interval between the dissolution of the first and the formation of the second partnership, which cannot be recovered in the name of either of the two firms unless the Defendant should consent, in order to save himself from the expense of a third action, to be brought for a small sum in the name of *Vansandau* alone.

The objection, however, which has been raised to the Plaintiffs' recovery is, that an attorney cannot sue for his bill till the business which he has been retained in is terminated. It would be long before I should be induced to assent to such a proposition. Suppose the employer to become insolvent while the attorney is engaged in a long and difficult suit, it would be hard if he could not recede, — resile, — from such an engagement. I agree that he cannot wantonly, so as to throw unexpected difficulties in the way of his client, take the course which has been taken by the Plaintiffs here. But have they wantonly, and without sufficient notice, refused to proceed with the Defendants cause? So far from it, the Defendant has, from the month of *June* 1828 to the present time, been repeatedly applied to for payment, and apprised of the Plaintiffs' resolution.

It is said, however, that there are authorities in support of the proposition for which the Defendant contends. That in *Siderfin* is, no doubt, strong; but we must see whether it proceeds on just principles, and whether it will apply to the facts of the present case. Now, in the report in *Siderfin*, no facts are stated to explain the decision of the Court. It may be, probably was the fact, that the attorney on the very day of the assizes deserted the conduct of the cause, giving his client neither time nor opportunity to obtain other professional assistance: if so, the decision of the Court was proper.

The

The next case is that of *Mordecai* v. *Solomon*. There it appeared that the plaintiff's brother had frequently employed an attorney, and had always paid him well; that he had undertaken to pay the attorney in the cause, but had not brought some money applied for by the attorney; that judgment of *non pros* was signed for not making up the issue; and that the plaintiff was in prison for not paying the costs of that judgment: the Court, upon a rule to shew cause why the Plaintiff's attorney should not pay the costs of the judgment of *non pros*, and the costs of that application, ordered the costs to be paid by the attorney in the cause; observing, that when an attorney had commenced a suit upon the credit of a client, he ought to proceed in it, although the client did not bring him money every time he applied for it.

I accede also to that proposition. It is not to be supposed that an attorney may suddenly give up his employment, because a client does not upon every occasion yield to his demand for money: but the report states no facts, without which the decision cannot be esteemed of great value: *ex facto oritur jus*: and for aught that appears, the conduct of the attorney might have been such as I have supposed in the preceding case.

The next authority is the passage in 14 *Ves.*, where Lord *Eldon* is made to say, "The client may discharge his solicitor: but I do not know that a solicitor, whatever may be his reasons for declining to proceed, can claim a lien, if he does not carry the business through to a hearing. If that could take place, there might be numerous claims of lien." What was passing in his Lordship's mind must have been with reference to the attorney's right to retain his lien after he has ceased to conduct the cause;— and I am far from saying that where he refuses to go on he can insist upon retaining

taining the papers; at once declining to proceed himself, and precluding his client from proceeding without him:—his Lordship then continues, "The Court of Common Pleas, when I was there, held that an attorney, having quitted his client before trial, could not bring an action for his bill." Here again we have not the facts on which the Court proceeded, but there is enough to warrant the inference that the attorney must have deserted his client suddenly, and have left him unprepared to act for himself.

Then we come to the case of *Rowson* v. *Earle*, in which Lord *Tenterden* held, that an attorney who had given notice that he would not go on with a cause in the Court of Chancery without being supplied with money, had a right to desist from it, and might recover for the work done up to that time. And there is no authority for the proposition on which the Defendant relies.

When we observe that the Plaintiffs commenced no action till *October* 1830, and that all the business charged for ended in the *April* preceding, we cannot say that the Plaintiffs were not justified in refusing to proceed farther.

It is for the advantage of the Defendant that the charges for business done by *Vansandau* while he was without a partner should be included in the second bill. Those charges, however, must be struck out unless the Defendant consents that they should remain. As to the rest, our judgment must be for the Plaintiffs.

GASELEE J. I am of the same opinion. Since the days of *Siderfin* there has been a great increase in the expense of conducting a cause, and it would be hard to compel an attorney to go on where he is not furnished with the necessary funds.

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BOSANQUET J. I cannot agree in the position contended for on the part of the Defendant; to the extent to which his counsel pushes it. It is true that an attorney cannot suddenly, and without notice, abandon a client to his prejudice and inconvenience; but, if he gives reasonable notice, he is at liberty to discontinue the conduct of a cause, and is not bound, at all events, and at great expense, to proceed to the end of a suit and all the proceedings arising out of it. As to the case in *Siderfin*, when we are ignorant of the facts on which that decision was grounded, and find that Lord *Tenterden* expressed a contrary opinion in *Rowson* v. *Earle*, we may fairly exercise our judgment on the point; and it seems to me that the position in *Siderfin* is too extensively laid down.

ALDERSON J. I am of the same opinion. All the cases cited on the part of the Defendant are consistent with the supposition that the refusal of the attorney to proceed was such as to render all the business done unprofitable to the client; if so, and the throwing up the retainer were without notice, sudden and unreasonable, I agree in the opinion expressed. In the present case, where the most ample notice has been given, we may decide consistently with that opinion, that the Plaintiffs are entitled to recover their costs.

Judgment for the Plaintiffs.

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WALL *v.* LYON.

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BY an order of *Parke* J. the Plaintiff had been allowed to amend his declaration after plea in abatement, without payment of costs.

Under the rule of *Michaelmas* 1654, *s.* 17. a party has a right to amend after plea in abatement on payment of costs, but the Court, or a Judge, have a discretion to allow him to amend without costs.

Ludlow Serjt. moved to amend this order, by substituting the word *upon*, for the word *without*. He relied on the rule of *Michaelmas* 1654, *s.* 17, that, before the declaration actually entered, the Plaintiff may amend his declaration, paying costs or giving an imparlance, at the Plaintiff's election, by the order of a Judge of the Court or prothonotary: but after it is entered, if the amendment be but a small matter that doth not deface the roll, yet that before issue or demurrer entered, it will be amendable by rule of Court upon costs, and liberty to plead with a new or further imparlance.

TINDAL C. J. The rule is not so worded as to be obligatory on the Court in the negative. It is a general rule, in acting on which the Judge may exercise a discretion, and there is no ground for the present application.

GASELEE J. The rule gives the party a right to amend on payment of costs; but it does not preclude the Court from *allowing* him to amend without costs.

BOSANQUET and ALDERSON Js. concurring, *Ludlow*
Took nothing.

Nov. 26.

DIGBY *v.* ALEXANDER.

Judgment of *respondeat ouster* having been given on a plea of peerage, and a verdict having afterwards been obtained for the Plaintiff, the Court refused to set aside, upon an affidavit of peerage, a writ of *ca. sa.* issued against the Defendant.

JUDGMENT of *respondeat ouster* having been given upon a plea of peerage in this case, (see *antè*, vol. viii. 416.) the cause went to trial, and a verdict was given for the Plaintiff. Whereupon a *ca. sa*, having been issued against the Defendant in *June* last,

Taddy Serjt. obtained a rule *nisi* to set it aside, on an affidavit that the Defendant was a Scotch peer, the same in substance as that on which the Court had formerly set aside the *capias ad respondendum* against the Defendant. (See *ante*, vol. viii. 5.)

Stephen Serjt. shewed cause. The required relief can only be granted, and that by *supersedeas*, where the party is named as a peer on the record, or has sat in parliament. Lord *Banbury*'s case (*a*), *Com. Dig.*, *Dignity*, F. 3. Countess of *Rutland*'s case (*b*). In the matter of the Countess of *Huntington*. (*c*)

Where he is not so named, and has not sat in parliament, but is a peer, his only remedy in a court of law is by plea in abatement: *Vin. Abr. Abatement*, F. b. Lord *Lonsdale* v. *Littledale* (*d*). *Trustees of Taunton Market* v. *Kimberly* (*e*). The Defendant here having pleaded his peerage in abatement, and his plea having been held insufficient, to discharge him now would be in effect to reverse the decision on that plea.

Here the Court called on

(*a*) 2 *Ld. Raymd.* 1247.
(*b*) 5 *Rep.* 26. *b.*
(*c*) 1 *Ventr.* 298.
(*d*) 2 *H. Bl.* 267. 299.
(*e*) 2 *W. Bl.* 1120.

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Taddy, to distinguish this case from Lord *Banbury's*. Lord *Banbury*, he contended, claimed as an *English* peer, the Defendant as a *Scotch* peer; and as the *Scotch* peers do not sit in parliament, like the *English*, by virtue of a writ of summons, the decisions as to *English* peers cannot apply. And the position in Lord *Banbury's* case, that the Court cannot try peerage on motion, is too general. That the court will entertain the question on motion, appears from *Trinder* v. *Shirley* (*a*), and from the first decision in this court in the present case, (*antè*, vol. viii. 55.) It was there held, that the fact that a defendant has voted for the sixteen peers of *Scotland*, is sufficient to authorize this Court to discharge him from a *capias ad respondendum*: and after that, it would be inconsistent to refuse to discharge him from a *capias ad satisfaciendum*; for, as a general rule, a *ca. sa.* lies not except where a *ca. ad resp.* lies. *Bac. Abr.* (*Execution*). 3 *Rep.* 12. And the Court has jurisdiction, although the Defendant's title do not appear on record; as may be collected from Lord *Savile's* case (*b*), and from the form of the writ in the *Register*, 287 b. *Fitz. N. B.* 247 c. Then, the Defendant is not concluded by his plea in abatement. For the Court in giving judgment, *quod respondeat ouster*, have not decided that he is not a peer, but that the plea did not allege the peerage with sufficient precision. And many things may be pleaded in bar after a plea in abatement; as outlawry; 2 *Lutw.* 1604; such matters as a party may plead indifferently in bar or in abatement; as alien enemy; property in a stranger, in replevin. Therefore, though the Defendant has not correctly availed himself of his plea of misnomer, he may avail himself of his peerage in another form and for another purpose. *Vin. Abr. Abatement*, F. b., only shews there can be no plea in abatement after imparlance; *Lord Lonsdale* v.

(*a*) *Dougl.* 45. (*b*) *Cro. Car.* 205.

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Littledale, that a party cannot object matter in abatement after pleading in chief; *The Trustees of Taunton Market* v. *Kimberly*, that misnomer cannot be objected in arrest of judgment, but only by way of plea in abatement.

TINDAL C. J. The question before the Court may be decided on a short point, without going into the early and abstruse authorities. Where a party has privilege of parliament, his remedy, on arrest, is by plea in abatement, or by application for a *supersedeas*. The Defendant in this cause pleaded in abatement; in such a way, however, as not to assert definitively that he was a peer, but merely to allege evidence on which he might go to a jury as to that fact. The Court held that plea insufficient, and awarded judgment of *respondeat ouster*; the cause went on to trial, and a verdict passed for the Plaintiff. Now after a judgment in this cause, in which the Defendant has been ordered to answer over as a common person, he is estopped to apply to the summary jurisdiction of the Court, on the ground that he is entitled to privilege as a peer. If our judgment be unsatisfactory, he may have it re-considered on a writ of error; but the present rule must be discharged.

GASELEE J. The Court have indulged the Defendant by setting aside the *capias ad respondendum*; though, if they had been aware of the case of *Smith* v. *Villars* (*a*), it is probable they would have confined the rule to discharging the Defendant upon his filing common bail; but it does not follow, because they indulged him then, that they are to continue the indulgence after the Defendant's plea in abatement has been over-ruled, and the cause has gone on as against a common person.

(*a*) 7 *Mod.* 38.

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In *Smith* v. *Villars*, the defendant pretending to be Earl of *Buckingham*, and being arrested by the name of *J. Villars, arm.*, upon motion concerning bail to be put in by him, the Court said, that he might without prejudice put in bail by the name by which he was arrested; because, being a civil action, he need not join in the recognizance, as the custom is in criminal causes: and that in the case of the Earl of *Banbury*, who was indicted by the name of *George Knowles*, Esq., because, by the course of the Court, he ought to join in the recognizance, and if he had entered into one by the name of *George Knowles*, it would be an estoppel upon him, therefore the Court indulged him to bring others who gave bail for him by the name of *George Knowles*, Esq., for their act could not conclude him.

BOSANQUET J. This Court in this cause cannot recognize the Defendant as a peer: he might have so pleaded in abatement as to raise an issue on that point; but he failed to do so, and the Court decided that his plea was bad: he then pleaded the general issue, and must be considered to have gone to trial as a common person. It has been urged, that after the indulgence granted on the writ of *capias ad respondendum*, it would be inconsistent to refuse the same indulgence on the writ of *ca. sa.* But after the party has had the opportunity of putting his claim of peerage on record, and the Court has decided on record that he has failed in his attempt, they cannot now try the same question on affidavit.

The writ cited from the register appears to have been a form of *supersedeas*, and the issuing of that writ is not incompatible with our refusal to interfere in a summary way after judgment on a plea in abatement.

ALDERSON J. concurred in discharging the rule.

Rule discharged.

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Nov. 26.

MELLISH *v.* RAWDON.

Plaintiff purchased in the market a bill drawn by Defendant on *G.* at *Rio Janeiro*, and payable at sixty days sight; the exchange falling after the purchase, Plaintiff kept the bill nearly five months, and then sold it again.

The drawee having failed before presentment, Plaintiff, after paying his indorsee the amount of the bill, sued the Defendant, the drawer:

Held, that the jury were correctly directed to consider, whether, looking at the situation and interests of both drawer and holder, there had been unreasonable delay on the part of the Plaintiff in forwarding the bill for acceptance or putting it in circulation; and the jury having found for the Plaintiff, the Court refused to disturb the verdict.

THIS was an action brought by the holder against the drawer of a bill of exchange, addressed to *Guimarroens* at *Rio de Janeiro*, and payable at sixty days after sight; the rate of exchange, at which the bill was to be paid, being fixed, by indorsement on the bill, at 22*d.* per milrea.

This bill had, by the Defendant's order, been offered for sale in the money market, and was purchased by the Plaintiff on the 10th of *September* 1830, at which time the rate of exchange was at the amount indorsed on the bill.

The Plaintiff kept the bill in his own hands, till the 1st of *February* 1831, when it was again sold by him in the market and put into circulation.

Guimarroens having failed before the bill reached *Rio*, the Plaintiff was obliged to pay a subsequent indorsee the amount, and now sought to recover it of the Defendant, the drawer.

Immediately after the bill came into the Plaintiff's hands the rate of exchange began to fall, and by the 1st of *February* 1831, had fallen from 22*d.* to 17½*d.*

It was proved at the trial that foreign bills were constantly bought and sold in the market for the purpose of speculation, and that this course of business was so general, that the Defendant could not but know that it existed.

There was no evidence of any such unvarying course having been observed with respect to foreign bills pay-

able

able at a given time after sight, as that the holder should send them forward for acceptance within any certain time; as, by the first or second packet which sailed after they came into his hands; on the contrary, there was conflicting evidence of the judgment and opinion of merchants on that point; some stating that such was their understanding of the course and practice, others stating that they understood foreign bills were usually kept, without being forwarded for acceptance, as long as it suited the convenience or interest of the holder.

But it appeared, that where drawers of foreign bills payable at any time after sight are desirous of limiting the time of their responsibility, there are various modes which they are accustomed to pursue to attain that object: either, they are in the habit of sending forward one part to a correspondent to procure acceptance, and bringing another part of the bill to the market, upon which is noted the time at which the first part was forwarded; or, they make it a matter of express stipulation with the purchaser, that the bill sold shall be sent forward within a limited time.

It was proved at the trial by all the witnesses, that if the bill was once put in circulation, it might be sent to any part of the world, and kept a reasonable time by each successive holder before it was passed on to the next.

Tindal C. J., before whom the cause was tried at the last *London* sittings, told the jury that they were to determine on the evidence before them, whether there had been an unreasonable delay on the part of the Plaintiff, the holder of the bill, in sending it forward for acceptance, or putting it into circulation: and that, in order to arrive at the proper determination of that question, they were to take into their consideration the situation and interests, not of the drawer only, or of the holder only, but the situation and interests of both; and to say, whether, under all the circumstances, the delay in this

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case, which amounted to four months and twenty-two days, was unreasonable or not.

The jury having found for the Plaintiff,

Taddy Serjt. moved to set aside the verdict on the ground of an alleged misdirection; contending that the proper question for the jury should have been, Whether due diligence had been used by the holder in sending forward the bill for acceptance, or putting it in circulation, with reference to the interests of the drawer.

By the law merchant it was the duty of the holder either to put the bill into immediate circulation, or, if he kept it in his own hands, to send it forward for acceptance by the first packet which sailed to *Rio* after he received the bill, or, at the latest, by the second. If the first holder has a right to detain the bill for five months, so has the second and every subsequent holder, and the drawer's responsibility may so be protracted interminably. The holder, therefore, of such a bill ought to proceed with the same diligence as the Courts have required at the hands of the holder of a banker's check, or of a note payable on demand, who by laches in presentment loses his claim against the maker: and in *Muilman* v. *D'Eguino* (*a*) *Buller* J. says, "If instead of putting the bill into circulation, the holder were to lock it up for any length of time, I should say he was guilty of laches."

A rule *nisi* having been granted,

Wilde Serjt. showed cause. The direction to the jury was correct. It would greatly clog the circulation of foreign bills, and be prejudicial to commercial intercourse, if the holder of such bills were not permitted to consult his own interests as well as those of the drawer, and were refused a reasonable latitude as to retaining or

(*a*) 2 *H. Bl.* 565.

forwarding

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forwarding the bill. According to the principle for which the Defendant contends, a merchant who has payments to make abroad must purchase his bills for that purpose at the precise time he is about to make the payment. But at that time it may happen that the market may be insufficiently supplied with the bills he requires, or the rate of exchange may be ruinously against him. It is essential therefore to his interests, and to the free circulation of such bills, that he should be enabled to buy them when induced to do so by a favourable state of the market or of the exchanges, and to retain them a reasonable time for his own profit or convenience. In the present instance the rate of exchange having fallen immediately after the purchase, the Plaintiff was justified in retaining the bill with a view to indemnify himself by any subsequent rise. The language of *Buller* J. applies to a wanton or careless detainer of the bill, and not to a detainer essential to the interests of the holder. [*Alderson* J. *Fry* v. *Hill* (*a*) explains the expressions to be found in *Muilman* v. *D'Eguino*.] And there is no danger that a right of retainer for such an object will in general be prejudicial to the interests of the drawer, for after any long detainer the holder will suffer more by loss of the interest of his money than he can possibly gain by any rise in the exchange. At all events, it is in the power of the drawer to secure himself, by sending out one part of the bill to be accepted, or by stipulating for its transmission within a given time.

The law of *France* (*Code de Commerce*, liv. i. tit. 8. s. 11,) requires that a bill drawn from the Continent or Isles of *Europe*, and payable within the *European* possessions of *France*, shall be presented within six months from the date, or the holder shall have no remedy against the

(*a*) 7 *Taunt.* 397.

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drawer or indorser; but in the law of *England* there is no such rule with respect to what are termed foreign bills. The drawer must calculate on the continued solvency of the drawee; for, without any detainer by a holder, the bill may, in passing from hand to hand, be months in circulation before presentment for acceptance.

Taddy, and *Andrews*, Serjt., with him, in support of the rule, contended, that the holder ought not to be permitted to consult his own interests to the injury of the drawer; that no instance could be shown in which a party had detained a bill nearly five months before presenting or putting it in a course of circulation; and that nothing but *vis major*, such as embargo, blockade, or imprisonment, could justify such a proceeding. *Buller* J. said, in *Muilman* v. *D'Eguino*, "due diligence is the only thing to be looked at, whether the bill be a foreign or an inland one; and whether it be payable at sight, at so many days after, or in any other manner."

The Court said they would take time to consider, not on account of any difficulty, but of the great importance of the case.

Cur. adv. vult.

TINDAL C. J. The rule obtained by the Defendant in this case, calling on the Plaintiff to show cause why there should not be a new trial, proceeds upon the ground that there has been a misdirection, in point of law, to the jury on the trial of the cause, in consequence of which misdirection the jury have returned their verdict improperly for the Plaintiff.

The rule of law laid down to the jury appears to have been substantially this,—that they were to determine on the evidence before them, whether there had been an unreasonable delay on the part of the Plaintiff, the holder of

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of the bill, in sending it forward for acceptance, or in putting it into circulation; and in order to arrive at the proper determination of that question, the jury were told that they were to take into their consideration the situation and interests, not of the drawer only, or of the holder only, but the situation and interests of both; and to say whether, under all the circumstances, the delay, in this case, which amounted to four months and twenty-two days, was unreasonable or not. This must be taken to be the *substance* of the direction; for although remarks were made incidentally on the different parts of the evidence as they occurred in summing it up, this was the basis of the charge: it was pointedly laid down at the beginning, and was again pointedly recurred to at the end of it; and there can be no doubt but that the jury, being a special jury of merchants, understood this to be the rule and guide of their judgment upon the question before them, and acted upon it in finding their verdict.

On the part of the Defendant it is contended that this direction was wrong, and that the proper question for the jury should have been, whether due diligence had been used by the holder in sending forward the bill for acceptance, or putting it in circulation, with reference to the interests of the drawer: and it was urged, in the course of the argument, that by the law merchant it was the duty of the holder, either to put the bill into immediate circulation, or, if he kept it in his own hands, to send it forward for acceptance by the first packet which sailed to *Rio* after he received the bill; or, at the latest, by the second. And the point now to be determined by us, is, whether the question submitted to the jury at the trial was the proper direction or not.

There was no evidence in the cause of any such general unvarying course having been observed with respect to foreign bills payable at a given time after sight, as, that the holder who kept them in his own hands, sent them

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forward for acceptance within any certain time, as, for instance, by the first or second packet which sailed after they came to his hands. Had there been proof of any such general usage, it would have put an end to all doubt; the parties would be taken to have dealt with each other on the footing of such usage; the reasonable time for forwarding the bill would have been then marked with the same precision as the reasonable time for giving notice of the dishonour of an inland bill; and the only point for the consideration of the jury would then have been, whether the bill had been sent forward within such limited time or not. But there was no such evidence of usage; on the contrary, there was conflicting evidence of the judgment and opinion of merchants on that point; some stating that such was their understanding of the course and practice, others on the contrary stating, that they understood foreign bills were usually kept without being forwarded for acceptance, as long as it suited the interests or convenience of the holder. Again, there is no definite time prescribed by the law of *England*, within which such presentment for acceptance must take place. In some countries, as in *France*, the times within which a foreign bill payable at sight, or at any certain time after, must be presented for acceptance to the drawee, are fixed by positive law, according to the place where, and the place on which the bill is drawn. Thus, for instance, where it is drawn from the continent of *Europe*, or the isles of *Europe*, and payable within the *European* possessions of *France*, such presentment for acceptance must be made within six months from the date; in default of which, the holder can have no remedy against the drawer or indorsers. (*Code de Commerce*, liv. 1. tit. 8. s. 11.) But there is no such law in *England*; and in the absence of any such positive regulation, or of any general usage, or course of trade, no other rule, as it appears to us, can be laid down as

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the limit within which the bill must be forwarded to its destination, than that it must take place within a reasonable time under all the circumstances of the case, and that there must be no unreasonable or improper delay.

Whether there has been in any particular case reasonable diligence used, or whether unreasonable delay has occurred, is a mixed question of law and fact, to be decided by the jury acting under the direction of the Judge, upon the particular circumstances of each case. The judgment of the Court of Common Pleas in the case of *Muilman* v. *D'Eguino* (*a*), seems to us to lead directly to this conclusion, and to no other. And although one expression used by Mr. Justice *Buller* in giving his judgment, is much relied on by the Defendant, namely, that "if instead of putting the bill into circulation, the holder were to lock it up for any length of time, I should say he was guilty of laches," such expression, when properly considered, only leaves the rule above laid down as uncertain and undefined in its application as it was before. "To lock the bill up for any length of time," does not, and cannot, mean, that keeping it in his hands for any time, however short, would make him guilty of laches. It never can be required of him, instantly on the receipt of it, under all disadvantages, either to put it into circulation, or to send it forward to the drawee for acceptance. To hold the purchaser bound by such an obligation, would greatly impede, if not altogether destroy the market for buying and selling foreign bills, to the great injury, no less than to the inconvenience of the drawer himself. For if he has no opportunity to realize his bill by sale at home, he can only obtain the amount, by sending it out to a correspondent at the place upon which it is drawn, incurring thereby delay, expense, and risk: and if the buyer is not to be allowed a reasonable discretion as to the

(*a*) 2 *H. Bl.* 565.

time

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time of parting with the bill, how can the drawer expect to find a ready sale? The meaning, therefore, of the expression above referred to is, and indeed the very form of the expression denotes it, that he must not lock the bill up for an indefinite time; that there must be some limit to its being kept from circulation; and what limit can there be, except that the time during which it is locked up must be reasonable? But what is or is not reasonable for that purpose, a jury must, with the assistance of the Judge, under all the circumstances of the particular case, determine.

In the present case, on the 10th of *September* 1830, the bill was sold in the market by the Defendant's broker, and purchased by the Plaintiff. It was kept by the Plaintiff in his own hands until the 1st of *February* 1831, when it was again sold by him in the market and put into circulation. But the rate of exchange in the market fell immediately after the purchase of the bill by the Plaintiff, and during the whole of the interval down to the very time of the sale of the bill by him, continued lower than it was at the time the Plaintiff purchased the bill. The point, therefore, which arises in this case is, as before observed, whether, in determining the question of reasonable time, the jury are to look exclusively to the interests of the drawer, or may take into account those of the holder also. And we are of opinion there is no rule of law, and no custom was proved at the trial, which should prevent the jury from looking, for that purpose, to the interests of both. The interest of the drawer is, that the bill should be presented as early as possible after he has sold it; for the longer the delay the greater the risk he runs of the insolvency of the drawee. The interest of the holder is, that he may be allowed to keep the bill until he can make a profit on it, or, at all events, save himself from loss. So long as the exchange remains steady, or, at all events,

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events, if it rises after he has taken the bill, his interest does not materially clash with that of the drawer; and on such a case the jury would probably think, with reference to the interest of both, that the reasonable time for sending forward the bill was satisfied by the allowance of a shorter and less extended period of time than if the interest of the holder and the drawer were in conflict and competition with each other. But if, as happened in the present case, the exchange falls immediately after the sale of the bill, the jury might then think a more extended period might fairly and reasonably be allowed the holder, in order to enable him *bonâ fide* to endeavour to make a fair profit, or, at all events, to endeavour to secure himself from actual loss. And, considering the nature of the transaction of the sale of the bill by the holder; the form of the security itself; and the expedients to which the drawer might have recourse to limit the time of the bill's circulation; we think a jury well warranted in coming to such a conclusion. At the time the bill was sold upon the market by the drawer, the rate of the exchange for the milrea was 22*d.*, which rate was upon the sale definitively fixed as that at which the bill was to be paid when due. Now, although the drawer may not have any direct interest himself in selling his bill at the time the milrea is at the highest value in *English* money, yet it is obviously for the benefit of his customer or correspondent, the drawee, that he should do so; inasmuch as the value so fixed on the milrea at the time of the sale is the value at which payment is to be made at *Rio* at the time the bill becomes due. The higher, therefore, the value of the milrea, the smaller will be the number which it will require from the drawee's funds to make up the sterling sum expressed in the bill.

It was further proved at the trial, that foreign bills were constantly bought and sold at the market for the purpose

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purpose of speculation: that this course of business was so general, that the Defendant could not but know that it existed: and the jury might probably infer, and if they did so, we think they were warranted by the evidence in so doing, that the Defendant must have known that the particular bill in question had been purchased by the plaintiff for that purpose. As, therefore, the drawer chose his own time for bringing the bill into the market, the jury might think it not unreasonable that the purchaser should have the privilege of keeping it until the state of the market was such as to enable him to part with it without any great loss. And if such was their opinion, we are not able to say that it was unreasonable or contrary to law.

But, further, it appeared upon the evidence at the trial, that where drawers of foreign bills, payable at any time after sight, are desirous of limiting the time of their responsibility, there are different modes which they are accustomed to pursue to attain that object: either they are in the habit of sending forward one part to a correspondent to procure acceptance, and bringing another part of the bill to the market, upon which is noted the time at which the first part was forwarded; or they make it a matter of express stipulation with the purchaser, that the bill sold shall be sent forward within a limited time. The jury in this case may have thought, that as the drawer had recourse to neither of these expedients, he tacitly permitted the purchaser to keep the bill until his own interest induced him to bring it again to the market; and that he had not abused this permission or kept the bill an unreasonable time when he resold it at the first opportunity which presented itself, if not of gaining a profit, at least of avoiding a loss. It is true, that by having recourse to either of the modes above referred to, the negociability of the bill is clogged whilst in the hands of the drawer; but if the drawer may limit

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the time his bill has to run, but does not, for the sake of his own advantage, the jury may have thought that the advantage he thereby obtained, was in the nature of a premium paid to him for running the risk of his drawee's insolvency, by the extended period that might elapse before the bill was presented.

Again, the holder of the bill has at all times a direct interest in not keeping the bill out of circulation a longer time than is necessary; for he loses the interest of his money, and runs the risk of the insolvency of the parties to the bill. This check, therefore, which must always operate against keeping back the bill capriciously or wantonly, the jury may have considered as having had its due effect in the present case, and as justifying them in making a more liberal allowance of time to the holder of the bill before he is to be compelled to put it in circulation.

Still further it was proved by all the witnesses on the trial, and indeed admitted on the argument of this rule, that if the bill was once put in circulation it might be sent to any part of the world, and kept a reasonable time by each successive holder before it was passed on to the next; so that, in effect, the time which would elapse before it was forwarded for acceptance, if put in circulation, might equal, if not exceed any period for which the bill can be supposed, under ordinary circumstances, to be kept back by the first purchaser. But whether the bill is locked up by the first purchaser, waiting for the turn of this market in his favour, or whether it is circulating through a distant part of *Europe* for an equal space of time, really seems to make little, if any, difference with respect to the drawer's risk. When the bill is circulating, the immediate motive for forwarding it to its destination will be a rise in the exchange: and the same motive will equally operate and produce the same effect if the bill still remains in the

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hands of the original purchaser. Perhaps the case presented itself to the jury in this point of view, whilst weighing the question, whether the bill had been kept back an unreasonable time, and they may have thought there was no objection to the allowing a liberal measure of time to the original holder before he put the bill in circulation, when such would be confessedly claimed and allowed to successive holders of the same bill.

Upon the whole we see no objection to the rule of law laid down at the trial for the government of the jury in the consideration of the question before them, and we think the jury have come to a proper conclusion on the evidence. We therefore think the rule for a new trial must be discharged.

Rule discharged.

Nov. 26.

GROVE *v.* ALDRIDGE.

After seizure, and before sale under a *fi. fa.*, while the Defendant's goods were yet in the possession of the sheriff, the officers of the customs seized them under a warrant to levy a penalty incurred by the Defendant for an offence against the revenue laws.

Held, that the sheriff was justified in returning *nulla bona* to the writ of *fi. fa.*

THIS was the case of an action against the sheriff of *Sussex* for a false return, in which there was a verdict for the Plaintiff, with 10*l.* damages, with liberty for the Defendant to move to enter a verdict for himself.

The facts proved at the trial were, that on the 22d of *June* the sheriff entered under a *fi. fa.*, issued by the Plaintiff, upon a judgment signed by him, on the 18th of the same month, against the Defendant in that suit. Afterwards, and whilst the sheriff was in possession of the goods under such writ, and before any sale, the officers of the customs entered to levy for a penalty recovered against the same Defendant, for an offence

against

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against the laws relating to the customs. The information upon which this penalty had been recovered, was laid before a magistrate against the party on the 5th of *June*; the Defendant had appeared thereto on the 29th, on which same day he was convicted by the magistrate, and the officers entered under the warrant issued on such conviction. The sheriff permitted the goods in question to be taken for the penalty, and returned *nulla bona* to the writ of *fi. fa.*; and whether such return was justifiable was the question.

Tuddy Serjt., in *Trinity* term 1829, obtained a rule *nisi* to set aside this verdict, against which rule

Wilde and *Spankie* Serjts. showed cause, when it appearing that the point to be determined was the same as in *Giles* v. *Grover*, *antè*, p. 128., the Court postponed judgment till that case should have been decided. (*a*) The House of Lords having disposed of *Giles* v. *Grover*, judgment, in the present case, was now delivered by

TINDAL C. J. At the time this case was argued the case of *Giles* v. *Grover* was undecided in the House of Lords, and the judgment of this Court was deferred until the decision of that case. The House of Lords has, however, since decided the rule of law to be, that where the sheriff seizes under a *fi. fa.*, and after such seizure, but before the sale under such writ, a writ of extent is sued out and delivered to the sheriff, the crown is entitled to the priority, and the sheriff must sell under the extent, and satisfy the crown's debt, before he sells under the *fi. fa.* (*b*)

(*a*) The arguments, in substance the same as those in *Giles* v. *Grover*, have been so fully entered into in the judgment of that case, that it would be improper to repeat them here.

(*b*) See *Giles* v. *Grover*, 9 *Bingh.* 128.

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That case is a decisive authority in favour of the Defendant, unless a distinction can be made between a warrant to levy a penalty given to the crown by a statute, and an execution under an extent. But we can see no sound distinction between a warrant issued to recover a debt to the crown and an extent. That the penalty in this case, after the conviction before a magistrate, constitutes a debt to the crown, is evident from the statute under which it was recovered, which enables the informer to recover the same "either by information or by suit;" and after a judgment in a suit for the penalty, it would unquestionably constitute a debt to the crown. If, then, it be a debt, whether the crown seeks to levy it by an extent, or by a warrant against the goods of the Defendant, can make no difference. Indeed, in this case, the information was laid, and, therefore, as it appears to us, the king's suit begun (if it had been necessary to decide that question), before the subject obtained his judgment. We therefore think the case above referred to governs the present, and, consequently, that the postea must be delivered to the Defendant.

Judgment for the Defendant.

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WOODHOUSE *v.* JENKINS.

THE following case, by the direction of the Vice-Chancellor, was submitted for the opinion of this Court:—

Under the limitations of the will of *Henry Southouse*, formerly of *Manuden*, in the county of *Essex*, dated the 3d of *November* 1743, the freehold part of and in the *Sun Tavern*, situate in the *Strand*, in the parish of *St. Martin-in-the-Fields*, in the county of *Middlesex*, was, in and before the year 1790, vested, as to one undivided third part thereof, in *Edward Southouse*, of *Manuden*, since deceased, for an estate in tail male in possession; and as to one other undivided third part thereof, in *Henry Southouse* of *Southampton*, since deceased, for his life, with remainder to *Edmund Edward Southouse*, since deceased, the eldest son of the said *Henry Southouse*, for an estate in tail male; and as to the remaining one other undivided third part in *Edward Southouse* of *Starcross*, since deceased, for his life, with remainder to *Charles Southouse*, the eldest son of the said last-named *Edward Southouse*, for an estate in tail male, with other remainders over.

In or about the month of *September* 1790, the said *Edward Southouse* of *Manuden*, agreed with the said *Henry Southouse* of *Southampton*, and *Edmund Edward Southouse*, his son, and with the said *Edward Southouse* of *Starcross*, and *Charles Southouse*, his son, respectively, for two several leases to be granted to the said *Edward Southouse* of *Manuden*, of the said two several last-mentioned undivided third parts of the premises for

Tenant for life, and his eldest son, the remainder-man in tail, leased to *E. S.* for ninety-nine years, and gave *E. S.*, who was acquainted with their title, a bond conditioned for the due observance of their covenant for quiet enjoyment. *E. S.* underlet to *W.* for sixty years, and covenanted with *W.* against eviction by any one claiming under *E. S.*, or by his acts, means, consent, *neglect*, *default*, privity, or procurement.

Tenant for life and his eldest son being dead without issue, *W.* was evicted by the next remainder-man in tail. Held, that *E. S.* was not liable on his covenant to *W.*, the eviction being by title paramount, which *E. S.* had no means of defeating.

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two several terms of ninety-nine years each, at certain annual rents; and two indentures of lease were executed in conformity with such agreement on the 29th of *September* 1790; one of them, between the said *Henry Southouse* of *Southampton*, and the said *Edmund Edward Southouse* (described as the eldest son and heir of the said *Henry Southouse*), of the one part, and the said *Edward Southouse* of *Manuden*, of the other part; the other, between *Edward Southouse* of *Starcross*, and *Charles Southouse* (therein described as his son and heir), of the one part, and *Edward Southouse* of *Manuden*, of the other part. In these leases the lessee covenanted in the usual way to pay rent, and the lessors, for themselves severally and respectively, and for their several and respective heirs, executors, administrators, and assigns, and for each and every of them, covenanted, promised, and agreed, to and with the lessee, the said *Edward Southouse* of *Manuden*, his executors, administrators, and assigns, that he, the said *Edward Southouse* of *Manuden*, his executors, administrators, and assigns, paying the said rent, and observing and performing, fulfilling and keeping all and every the covenants, clauses, provisos, conditions, and agreements which on his part were or ought to be paid, observed, fulfilled, and kept, should and might peaceably and quietly have, hold, use, occupy, possess, and enjoy the said messuage or tenement and other the said thereby demised premises, with the appurtenances, for and during the said term of ninety-nine years thereby granted, without any let, suit, trouble, denial, eviction, hindrance, or interruption, of or by them the lessors, or either of them, their or either of their heirs or assigns, or of or by any other person or persons whomsoever lawfully claiming or to claim by, from, or under him, them, or any of them, or by or through his, their, or any of their acts, means, consent, or procurement.

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Before and at the time of the agreement for the said leases of 1790, the said *Edward Southouse* of *Manuden* was aware of and acquainted with the state of the title of the lessors respectively to the said premises thereby demised. And in the year 1791 the said *Henry Southouse* of *Southampton* and the said *Edmund Edward Southouse*, his son, agreed with the said *Edward Southouse* of *Manuden* to give, and made and executed and delivered to him, a bond in the penal sum of 200*l.*, the condition of which recited that in and by a certain indenture of lease, made in *September* 1790, between the said *Henry Southouse* and *Edmund Edward Southouse*, the obligors, of the one part, and the said *Edward Southouse* of *Manuden* of the other part, the said *Henry Southouse* and *Edmund Edward Southouse* did, for the considerations therein mentioned, demise, lease, set, and to farm let unto the said *Edward Southouse*, his executors, administrators, and assigns, all that one undivided third part or share of and in the freehold part of the said tavern, and then in the occupation of the above-named *Edward Southouse* of *Manuden*, for and during, and unto the full end and term of ninety-nine years; that the said *Henry Southouse*, the obligor, was entitled to the said third part of the said premises for the term of his natural life only, and the said *Edmund Edward Southouse* was entitled thereto as tenant in tail, after the decease of the said *Henry Southouse*; that they being desirous to save the expense of a recovery, and that the said recited lease might be fully performed for and during the term aforesaid by such person or persons as should take the inheritance of the same premises in remainder, and that the said lease might continue and be in force for the term aforesaid, had agreed to enter into the bond or obligation aforesaid: and the condition was, that, if the said *Henry Southouse*, and *Edmund Edward*

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Southouse, or either of them, their or either of their heirs, executors, or administrators, should fulfil, perform, and keep, or cause to be done, fulfilled, performed, and kept, the several conditions, clauses, and agreements, contained in the said recited indenture of lease which were therein agreed to be done, fulfilled, performed, and kept by and on the parts and behalf of the said *Henry Southouse* and *Edmund Edward Southouse*, their heirs and assigns, then the above written obligation should be void and of non-effect, otherwise to remain in full force and virtue. In the year 1792 a similar bond was given to *Edward Southouse*, of *Manuden*, by the said *Edward Southouse*, of *Starcross*, and the said *Charles Southouse* his son.

In *Hilary* term 1795, the said *Edward Southouse*, of *Manuden*, suffered a common recovery of the said undivided third part of which he himself was so seised in tail, and thereby acquired an estate in the same in fee-simple.

By an indenture made the 2d of *March* 1795, between the said *Edward Southouse*, of *Manuden*, of the one part, and *Joseph Allen* and *Charles Harman* of the other part, it was recited that the said *Edward Southouse*, of *Manuden*, being entitled to one undivided third part of the freehold part of the said premises called the *Sun Tavern*, in his own right, and to one other undivided third part thereof by virtue of a lease for ninety-nine years to him granted by *Henry Southouse*, and *Edmund Edward* his son and heir, and to the remaining undivided third part thereof, by virtue of a lease for ninety-nine years to him granted by *Edward Southouse* and *Charles Southouse* his eldest son, had agreed to grant to the said *Joseph Allen* and *Charles Harman*, their executors, administrators, and assigns, a lease of the freehold part of the said premises called the *Sun Tavern*, for the term of sixty years, at and under

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the yearly rent, covenants, provisos, and agreements thereinafter contained; and it was witnessed, that in consideration of the yearly rent and covenants thereinafter reserved and contained, and which on the part and behalf of the said *Joseph Allen* and *Charles Harman*, their executors and administrators, were and ought to be paid, done, and performed, he, the said *Edward Southouse* of *Manuden* demised unto the said *Joseph Allen* and *Charles Harman*, their executors, administrators, and assigns, the freehold part of the said tavern, to hold the same unto the said *Joseph Allen* and *Charles Harman*, their executors, administrators, and assigns, from *Christmas-day* then last past, for the term of sixty years, yielding and paying therefor yearly during the said term unto the said *Edward Southouse* of *Manuden*, his executors, administrators, and assigns, the clear yearly rent of 61*l.* payable as therein mentioned. And the said *Edward Southouse* of *Manuden* for himself, his executors, administrators, and assigns, did thereby covenant, promise, and agree to and with the said *Joseph Allen* and *Charles Harman*, their executors, administrators, and assigns, that he and they well and truly paying the said yearly rent of 61*l.* at the days thereinbefore limited for the payment thereof, and observing, performing, fulfilling, and keeping all and every the covenants and agreements in the said indenture contained on the part and behalf of the said *Joseph Allen* and *Charles Harman*, their executors, administrators, and assigns, to be performed and kept according to the true intent and meaning of the said indenture, should, and lawfully might, peaceably and quietly have, hold, use, occupy, possess, and enjoy the said messuages or tenements and premises thereby demised, with their and every of their appurtenances, for and during all the said term of sixty years thereby granted, without any lawful let, suit, trouble, eviction, ejection, molestation, or interruption, of or by

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the said *Edward Southouse* of *Manuden*, his heirs, executors, administrators, and assigns, or of or by any other person or persons whomsoever, *lawfully claiming, or to claim by, from, or under him, them, or any of them, or by his, their, or any of their acts, means, consent, neglect, default, privity, or procurement.*

By certain mesne assignments, the premises demised by the said lease of the 2d of *March* 1795, were assigned and became vested in the Plaintiff *Henry Cooper Woodhouse*, as assignee of the said lease, and he entered into and continued in possession of the said premises till he was evicted as hereinafter mentioned.

Before the year 1790, the said *Charles Southouse* and *Edmund Edward Southouse* had attained the age of twenty-one. *Edward Southouse*, of *Stanrows*, *Henry Southouse*, of *Southampton*, *Charles Southouse*, and *Edmund Edward Southouse*, respectively died before the year 1829; *Charles Southouse* and *Edmund Edward Southouse* respectively had no issue male; and upon their death, and before the year 1829, the said two undivided third parts of the said freehold premises, wherein the said *Charles* and *Edmund Edward* were respectively interested as aforesaid, became vested in the Rev. *Edward Southouse*, as entitled to the same respectively under the limitations in the said will of the said *Henry Southouse* formerly of *Manuden*, in remainder expectant upon the determination of the estates of the said *Charles* and *Edmund Edward* therein respectively; and in the year 1829, the said Rev. *Edward Southouse*, lawfully claiming under such title, entered upon the said two undivided third parts of the said freehold premises, and evicted the said Plaintiff *Henry Cooper Woodhouse* therefrom.

The said *Edward Southouse*, of *Manuden*, died several years ago. The Defendant, *Anthony Jenkins*, was the executor of *Edward Southouse*, of *Manuden*, and his legal representative, both as to his real and personal estate.

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The question for the opinion of the Court was, whether the Plaintiff was entitled, in respect of the said eviction, to maintain an action of covenant upon the said indenture of lease, dated the 2d of *March* 1795?

This case was argued in *Trinity* term last by

Stephen Serjt. for the Plaintiff. The Defendant is liable on *Edward Southouse* of *Manuden*'s covenant for quiet enjoyment. For the Rev. *Edward Southouse* has recovered the premises against the Plaintiff through the neglect and default of *Edward Southouse* of *Manuden* in not procuring the original lessors, and their sons to suffer a common recovery. In *Butler* v. *Swinerton* (*a*) the covenant was against disturbance by the lessor, or any other person, "by or through his means, title, or procurement." The lessor, when he purchased the premises, had procured the conveyance of the estate to be made to himself and his wife, and the heirs of himself; after his death his wife evicted the lessee: and the lessee was held entitled to recover under the covenant, because the lessor might have taken the original conveyance to himself alone. So in *Lady Cavan* v. *Pulteney* (*b*), upon a covenant very similar to the present, the lease having been avoided by a remainder-man, the Chancellor thought the lessor responsible, because it had always been in his power, by an easy act, to make himself owner of the property. In *Howes* v. *Brushfield* (*c*), where the seller covenanted to the purchaser of an estate that he should enjoy and receive the rents, &c., without any action or interruption from the seller or those claiming from him, his executors, &c. or by, through, or with him or their acts, means, default, &c.; it was held that a breach was well assigned in respect of certain

(*a*) *Cro. Jac.* 659. *Palm.* 339.

(*b*) 2 *Ves.* jun. 544.

(*c*) 3 *East*, 490.

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quitrents in arrear before and at the time of the conveyance, though not stated to have accrued while the seller was tenant of the premises.

Adams Serjt. *contrà*. *Edward Southouse* of *Manuden* had no means of compelling the original lessors and their sons to suffer a recovery. *Thomas* v. *Powell* (*a*), *Hallett* v. *Middleton*. (*b*) The Plaintiff, therefore, has not been evicted by the default or procurement of *Edward Southouse* of *Manuden*, but by title paramount, after having taken the lease with a full knowledge of the lessor's title. It would have been useless for the lessor to limit the covenant to his own act or default, if he were also to be responsible against title paramount. In *Butler* v. *Swinerton* it was by the procurement of the lessor that his wife obtained the power to evict the lessee; and in *Howes* v. *Brushfield* it was by the clear default of the lessor that the lessee was compelled to pay quitrents, contrary to the covenant of the lessor. *Lady Cavan* v. *Pulteney* was compromised, without any decision; but as it was always in the lessor's power to have secured the lessee, his omission to do so was a manifest default. In *Evans* v. *Vaughan* (*c*) the default was of a similar description. Here it was not in the power of *Edward Southouse* of *Manuden* to compel the original lessors to suffer a recovery.

Stephen, in reply, referred to *Fildes* v. *Hooker* (*d*), where, on a bill by vendor, for specific performance of an agreement to take a lease for twenty-one years at rack-rent, the Master having reported in favor of the title shewn by the abstract, and an exception being taken to the report, the question was, whether, where the

(*a*) 2 *Cox*, 394.
(*b*) 1 *Russ.* 243.
(*c*) 4 *B. & C.* 261.
(*d*) 2 *Merivale*, 424.

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agreement was silent, the vendor of a leasehold interest was bound to produce the title of the lessor: and the exception was allowed. And it was holden that, whether the interest contracted for were freehold or leasehold, for a long term of years or a short lease at rack-rent, the party who comes for a specific performance should be prepared to shew that he was able to give what he sought to compel the other to take.

Cur. adv. vult.

TINDAL C. J. Although it might have been sufficient to certify our opinion to the Vice-Chancellor, from whose Court this case was sent, "that the Plaintiff is *not* entitled, in respect of the eviction set forth in the case, to maintain an action of covenant upon the indenture of lease, dated the 2d of *March* 1795," yet as this general opinion, in the negative, would leave the grounds upon which our judgment is formed, in complete uncertainty, we think it better to state those grounds shortly on the present occasion.

The covenant for quiet enjoyment, contained in the lease of 1795, is a covenant against any eviction "by *Edward Southouse* of *Manuden*, the lessor, his heirs, executors, administrators, and assigns, or any persons whomsoever lawfully claiming, or to claim, by, from, or under him, them, or any of them, or by his, their, or any of their acts, means, consent, neglect, default, privity, or procurement." It appears, from the facts stated to us, that *Edward Southouse* of *Manuden*, the lessor, claimed to be entitled to one-third part of the premises, under a lease for ninety-nine years made to him by a tenant for life, and his eldest son the remainder-man in tail; and to another third part under another lease made to him by lessors having precisely the same interest in such other third part. And it appears further that the tenants for life having died, and the remainder-men in tail, who

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had joined in such leases, having also died without issue, the Rev. *Edward Southouse*, the ultimate remainder-man, who was no party to the leases for ninety-nine years, has entered by his title paramount, and avoided such leases, and evicted the parties in possession under the lease of *Edward Southouse* of *Manuden* of 1795. The question, therefore, is, whether an eviction by the ultimate remainder-man under these circumstances can be considered a breach of the covenant above referred to.

Now it is obvious in the first place, that such eviction is not an eviction by *Edward Southouse* of *Manuden* himself, his heirs or assigns, or *any one claiming by, from, or under* him or them: it is an eviction by a person claiming by title paramount to *Edward Southouse* of *Manuden*. If therefore such eviction can be brought within the terms of the covenant, it must fall within that part of it which provides against any person claiming "by the acts, means, consent, neglect, default, privity, or procurement of *Edward Southouse* of *Manuden*, or any one claiming under him."

In the next place, it does not appear to be an eviction arising from the *acts*, *means*, or *procurement* of the lessor. In the case of *Butler v. Lady Swinerton* (a), Sir *John Swinerton*, the lessor, covenanted for quiet enjoyment by the lessee against the disturbance of himself, or of any other person "by or through his means, title, or procurement." Sir *J. Swinerton*, when he purchased, had *procured* the conveyance of the estate to be made to himself and his wife, and to the heirs of himself; and after his death, his wife evicted the lessee. It was held by the Court, that the wife was a person within the covenant, who claimed by the *means* of the husband; for if he had not *procured* the fine to be

(a) *Cro. Jac.* 677. and more fully reported in *Palmer's Rep.* 339. and 2 *Roll. Rep.* 286.

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made to himself and his wife, she would not have had any estate. In the present case, no *act* is done by the lessor; no *consent* is given to the eviction, there is no *privity*, no *procurement*; and, consequently, the only words of the covenant, if any, upon which a breach could be assigned, would be the remaining words "neglect or default."

Now it must be admitted, that the eviction would have been prevented, if *Edward Southouse* of *Manuden*, at the time he took the leases for ninety-nine years, had required the lessors to join in common recoveries to cut off the entails, and if the lessors had complied with such requisition. The question is, therefore, whether the not procuring such common recoveries to be suffered was a "neglect or default" in *Edward Southouse* of *Manuden*, within the meaning of the covenant. And we are of opinion that no breach of covenant could be assigned on those words, unless it could be averred in the declaration, that *Edward Southouse* of *Manuden*, at the time the leases were made to him, had the power or means of procuring such common recoveries to be suffered by his lessors, the tenants for life and in tail, and that he neglected or omitted so to do. With such an allegation made and proved, we think an action of covenant might possibly be maintainable, but not without it. For if *Edward Southouse* of *Manuden* had no means of compelling common recoveries to be suffered by the lessors, if upon his requisition they refused, it can hardly be said that he was guilty of any neglect or default in not procuring that step to be taken which he was unable to compel. It may, indeed, shew a want of discretion in *Edward Southouse* of *Manuden*, that he took leases under such a defeasible title; but a *neglect* and a *default* seem to imply something more than the mere want of discretion with respect to his own interests; something like the breach of a

duty

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WOODHOUSE v. JENKINS.

duty or legal obligation existing at the time; those words, in their proper sense, implying the not doing some act to secure his title which he ought to have done, and which he had the power to do; and the not preventing or avoiding some danger to the title, which he might have prevented or avoided. And this seems to agree with the view which Lord *Rosslyn* takes of a covenant very similar in its terms to the present: in the case of *Lady Cavan* v. *Pulteney* (*a*), the Chancellor, in stating his opinion that General *Pulteney* was liable upon the covenant for quiet enjoyment contained in the leases he had granted, which had been avoided by the remainder-man, says, "to all appearance he was the owner,—in substance he was the owner, *for it was always in his power, by an easy act, to make himself so.*" And, again, "the title might have been made perfectly absolute in him by a trifling expense on his part." Now, in the present case, it does not appear that *Edw. Southouse* of *Manuden* ever had the power of procuring his lessors to suffer common recoveries; it does not appear that he neglected any means which he possessed, of thereby making his title indefeasible: on the contrary, it is rather to be inferred, from the recital in the bonds of indemnity, that the tenants in tail, if they had not actually refused, had been unwilling to suffer recoveries, as the bonds were expressly given by them to avoid the expense of such proceedings. We think, therefore, as the statement of facts at present stands upon this case, that no breach could be assigned upon the covenant in question, and that we shall certify to the Vice-Chancellor accordingly.

(*a*) 2 *Ves.* jun. 559.

1832.

GENERAL RULES

AGREED UPON BY THE JUDGES IN PURSUANCE OF THE STATUTE 2 W. 4. c. 39.

IT IS ORDERED, That every writ of summons, *capias*, and detainer shall contain the names of all the Defendants [if more than one] in the action, and shall not contain the name or names of any Defendant or Defendants in more actions than one.

IT IS FURTHER ORDERED, That the following fees shall be taken:

	£	s.	d.
For signing all writs for compelling an appearance, whether of summons, *distringas*, *capias*, or detainer, and whether the same shall be the first writ, or an *alias* or *pluries* writ: and whether the same shall issue into the same county as the preceding writ, or into a different county -	0	2	6
For sealing the same - - -	0	0	7
For entering an appearance for every Defendant - - - -	0	1	0
Unless an appearance shall be entered for more than one Defendant by the same attorney, and in that case for every additional Defendant - - -	0	0	4

IT IS FURTHER ORDERED, That the person serving a writ of summons shall, within three days at least after such

1832. such service, indorse on such writ the day of the week and month of such service, otherwise the Plaintiff shall not be at liberty to enter an appearance for the Defendant according to the statute; and every affidavit, upon which such an appearance shall be entered, shall mention the day on which such indorsement was made.

IT IS FURTHER ORDERED, That the sheriff or other officer or person to whom any writ of *capias* shall be directed, or who shall have the execution and return thereof, shall, within six days at the least after the execution thereof, whether by service or arrest, indorse on such writ the true day of the execution thereof; and, in default thereof, shall be liable in a summary way to make such compensation for any damage which may result from his neglect, as the Court or a Judge shall direct.

IT IS FURTHER ORDERED, That the second rule of *Hilary* term 1832 shall be applicable to all writs of summons, *distringas*, *capias*, and detainer issued under the authority of the said act, and to the copy of every such writ.

IT IS FURTHER ORDERED, That any *alias* or *pluries* writ of summons may, if the Plaintiff shall think it desirable, be issued into another county, and any *alias* or *pluries* writ of *capias* may be directed to the sheriff of any other county, the Plaintiff in such case upon the *alias* or *pluries* writ of summons describing the Defendant as late of the place of which he was described in the first writ of summons, and upon the *alias* or *pluries* writ of *capias* referring to the preceding writ or writs as directed to the sheriff to whom they were in fact directed.

1832.

IT IS FURTHER ORDERED, That the *alias* or *pluries* writ of summons into another county shall be in the following form: —

William the Fourth, &c.

To *C. D.* of in the county of late of in the county of [original county]. We command you as before, [or, often] we have commanded you, &c. [as in the writ of summons, No. I. in the schedule of the said act].

And that the *alias* and *pluries* writ of *capias* shall be in the following form: —

William the Fourth, &c.

To the sheriff of

We command you, as heretofore we have commanded the sheriff of that you omit not, &c. [as in the writ of *capias* No. 4. in the schedule of the said act].

IT IS FURTHER ORDERED, That in every writ of *distringas*, issued under the authority of the said act, a *non omittas* clause may be introduced by the Plaintiff, without the payment of any additional fee on that account.

IT IS FURTHER ORDERED, That when the attorney actually suing out any writ shall sue out the same as agent for an attorney in the country, the name and place of abode of such attorney in the country shall also be indorsed upon the said writ.

IT IS FURTHER ORDERED, That if the Plaintiff or his attorney shall omit to insert in or indorse on any writ or copy thereof any of the matters required by the said act, to

1832. to be by him inserted therein or indorsed thereon, such writ or copy thereof shall not, on that account, be held void, but may be set aside as irregular, upon application to be made to the Court out of which the same shall issue, or to any Judge.

IT IS FURTHER ORDERED, That upon all writs of *capias*, where the Defendant shall not be in actual custody, the Plaintiff at the expiration of eight days after the execution of the writ, inclusive of the day of such execution, shall be at liberty to declare *de bene esse*, in case special bail shall not have been perfected; and if there be several Defendants, and one or more of them shall have been served only and not arrested, and the Defendant or Defendants so served shall not have entered a common appearance, the Plaintiff shall be at liberty to enter a common appearance for him or them, and declare against him or them in chief and *de bene esse* against the Defendant or Defendants who shall have been arrested and shall not have perfected special bail.

IT IS FURTHER ORDERED, That in case the time for pleading to any declaration, or for answering any pleading shall not have expired before the 10th day of *August* in any year, the party called upon to plead, reply, &c. shall have the same number of days for that purpose, after the 24th day of *October*, as if the declaration or preceding pleading had been delivered or filed on the 24th day of *October*; but in such cases it shall not be necessary to have a second rule to plead, reply, &c.

IT IS FURTHER ORDERED, That in case a Judge shall have made an order in vacation for the return of any writ issued by authority of the said act, or any writ of *capias ad satisfaciendum*, *fieri facias*, or *elegit*, on any day in vacation, and such order shall have been duly served,

but

1832.

but obedience shall not have been paid thereto, and the same shall have been made a rule of Court in the term then next following, it shall not be necessary to serve such rule of Court or make any fresh demand of performance thereon, but an attachment shall issue forthwith for disobedience of such order, whether the thing required by such order shall or shall not have been done in the mean time.

IT IS FURTHER ORDERED, That if any attorney shall, as required by the said act, declare that any writ of summons or writ of *capias* upon which his name is indorsed was not issued by him or with his authority or privity, all proceedings upon the same shall be stayed until further order.

IT IS FURTHER ORDERED, That every declaration shall in future be entitled in the proper Court, and of the day of the month and year on which it is filed or delivered, and shall commence as follows: —

DECLARATION after summons.

Venue. *A. B.*, by *E. F.* his attorney, [or in his own proper person,] complains of *C. D.* who has been summoned to answer the said *A. B.*, &c.

DECLARATION after arrest, where the party is not in custody.

Venue. *A. B.*, by *E. F.* his attorney, [or in his own proper person,] complains of *C. D.* who has been arrested at the suit of the said *A. B.*, &c.

DECLARATION where the party is in custody.

Venue. *A. B.*, by *E. F.* his attorney, [or in his own proper person,] complains of *C. D.* being de-

1832.

tained at the suit of the said *A. B.* in the custody of the sheriff [or of the Marshal of the Marshalsea of the Court of King's Bench, or of the Warden of the Fleet.]

DECLARATION after the arrest of one or more Defendant or Defendants, and where one or more other Defendant or Defendants shall have been served only and not arrested.

Venue. *A. B.*, by *E. F.* his attorney, [or in his own proper person,] complains of *C. D.* who has been arrested at the suit of the said *A. B.* [or being detained at the suit of the said *A. B.* as before] and of *G. H.* who has been served with a writ of *capias* to answer the said *A. B.*, &c.

And that the entry of pledges to prosecute at the conclusion of the declaration shall in future be discontinued.

TENTERDEN.	J. PARKE.
N. C. TINDAL.	W. BOLLAND.
LYNDHURST.	J. B. BOSANQUET
J. BAYLEY.	W. E. TAUNTON.
J. A. PARK.	E. H. ALDERSON.
J. LITTLEDALE.	J. PATTESON.
S. GASELEE.	J. GURNEY.
J. VAUGHAN.	

IT IS ORDERED, That the writ of *capias* and *distringas* which shall hereafter be issued out of the superior Courts of law at *Westminster* into the counties palatine of *Lancaster* or *Durham*, shall be directed to the Chancellor of the county palatine of *Lancaster*, or his deputy there, or to the Bishop of *Durham*, or his Chancellor there, and shall be in the following form: —

WRIT

WRIT OF DISTRINGAS. 1832.

William the Fourth, &c.

To the Chancellor of our county palatine of *Lancaster*, or his deputy there; or

To the Reverend Father in God by Divine Providence Lord Bishop of *Durham*, or to his Chancellor there, greeting. We command you that by our writ under the seal of our said county palatine to be duly made and directed to the sheriff of our said county palatine, you command the said sheriff [or, if in *Durham*, that by our writ under the seal of your Bishopric, to be duly made and directed to the sheriff of the county of *Durham*, you cause the said sheriff to be commanded] that he omit not by reason of any liberty in his bailiwick, but that he enter the same and distrain upon the goods and chattels of *C. D.* for the sum of forty shillings, in order to compel his appearance in our Court of to answer *A. B.* in a plea of trespass on the case, [or debt, or as the case may be,] and how he shall execute that our writ that he make known to us in our said Court on the day of now next ensuing.

Witness at *Westminster*, the day of in the year of our reign.

NOTICE to be subscribed to the foregoing writ.

In the Court of

Between { *A. B.* - - - Plaintiff, and *C. D.* - - - Defendant.

Mr. *C. D.*

TAKE NOTICE, That I have this day distrained upon your goods and chattels in the sum of forty shillings

1852.

in consequence of your not having appeared in the said Court to answer to the said *A. B.* according to the exigency of a writ of summons bearing teste on the day of , and that in default of your appearance to the present writ within eight days inclusive after the return hereof, the said *A. B.* will cause an appearance to be entered for you, and proceed thereon to judgment and execution, or [if the Defendant be subject to outlawry] will cause proceedings to be taken to outlaw you.

WRIT OF CAPIAS.

William the Fourth, &c.

To the Chancellor of our county palatine of *Lancaster*, or his deputy there; or

To the Reverend Father in God by Divine Providence Lord Bishop of *Durham*, or to his Chancellor there, greeting. We command you, that by our writ under the seal of our said county palatine to be duly made and directed to the sheriff of our said county palatine, you command the said sheriff [or, if in *Durham*, that by our writ under the seal of your Bishopric to be duly made and directed to the sheriff of the county of *Durham*, you cause the said sheriff to be commanded] that he omit not by reason of any liberty in his bailiwick, but that he enter the same, and take *C. D.* of if he shall be found in his bailiwick, and him safely keep until he shall have given him bail or make deposit with him according to law in an action on promises [or of debt, &c.] at the suit of *A. B.*, or until the said *C. D.* shall by other lawful means be discharged from his custody, and that

1832.

that he further command him, that on execution thereof he do deliver a copy thereof to the said *C. D.*, and that the said writ do require the said *C. D.* to take notice, that within eight days after execution thereof on him, inclusive of the day of such execution, he should cause special bail to be put in for him in our Court of to the said action; and that in default of his so doing, such proceedings may be had and taken as are mentioned in the warning thereunder written or indorsed thereon. And that he further command the said sheriff, that immediately after the execution thereof, he do return that writ to our said Court, together with the manner in which he shall have executed the same, and the day of the execution thereof; or that if the same shall remain unexecuted, then that he do so return the same at the expiration of four calendar months, from the date thereof, or sooner if he shall be thereto required, by order of the said Court or by any Judge thereof.

Witness at *Westminster* the day of

MEMORANDUM to be subscribed to the writ.

N. B. This writ is to be executed within four calendar months from the date thereof, including the day of such date, and not afterwards.

A WARNING TO THE DEFENDANT.

1. If a Defendant being in custody shall be detained on this writ, or if a Defendant being arrested thereon shall go to prison for want of bail, the Plaintiff may declare against such Defendant before the end of

1892.

the term next after such detainer or arrest, and proceed thereon to judgment and execution.

2. If a Defendant being arrested on this writ shall have made a deposit of money, according to the statute 7 & 8 *G.* 4. *c.* 71., and shall omit to enter a common appearance to the action, the Plaintiff will be at liberty to enter a common appearance for the Defendant and proceed thereon to judgment and execution.

3. If a Defendant having given bail on the arrest, shall omit to put in special bail as required, the Plaintiff may proceed against the sheriff or on the bail bond.

4. If a Defendant having been served only with this writ and not arrested thereon, shall not enter a common appearance within eight days after such service, the Plaintiff may enter a common appearance for such Defendant, and proceed thereon to judgment and execution.

INDORSEMENTS to be made on the writ of *Capias*.

Bail for £ by affidavit,

or

Bail for £ by order of [naming the Judge making the order], dated the day of .

This writ was issued by *E. F.* of , attorney for the Plaintiff [or Plaintiffs] within named,

or

This writ was issued in person by the Plaintiff within named, [mention the city, town, or parish, and also the

the name of the hamlet, street, and number of the house of the Plaintiff's residence, if any such there be.] 1832.

N. C. TINDAL.	J. PARKE.
LYNDHURST.	W. BOLLAND.
J. BAYLEY.	J. B. BOSANQUET.
J. A. PARK.	W. E. TAUNTON.
J. LITTLEDALE.	E. H. ALDERSON.
S. GASELEE.	J. PATTESON.
J. VAUGHAN.	J. GURNEY.

MEMORANDA.

THE Right Honourable *Charles*, Lord *Tenterden*, Lord Chief Justice of the Court of King's Bench, died the early part of this term; and was succeeded by Sir *Thomas Denman*, Knight, His Majesty's Attorney-General, who was called to the degree of the coif, and gave rings with the motto, "*Lex omnibus una.*" On the 8th of *November* Sir *Thomas* was sworn into office, and took his seat on the Bench on the following day.

Sir *William Horne*, Solicitor-General to His Majesty, succeeded to the office of Attorney-General; and *John Campbell*, of *Lincoln's Inn*, Esquire, one of His Majesty's Counsel, was appointed Solicitor-General to His Majesty, and afterwards received the honour of knighthood.

On the first day of this term, *John Beames*, *Robert Mounsey Rolfe*, and *Clement Tudway Swanston*, of *Lincoln's Inn*, Esquires, and *Henry Hall Joy*, of the *Inner*

1832. *Temple*, Esquire, having been, during the preceding vacation, appointed His Majesty's Counsel, were called within the bar, and took their seats accordingly: and

Mr. Serjt. *Spankie* was appointed one of His Majesty's Serjeants, and took his seat within the bar accordingly.

END OF MICHAELMAS TERM.

CASES

ARGUED AND DETERMINED

1833.

IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Hilary Term,

In the Third Year of the Reign of WILLIAM IV.

Ex parte YATES.

Jan. 11.

As an attorney may be struck off the roll of this Court upon reading a rule for striking him off the roll of K. B., so he may be re-admitted here upon reading a rule of K. B. for his re-admission in that Court.

IN the year 1823 *Yates* was struck off the roll of attornies of the Court of King's Bench, upon affidavits disclosing his conviction for a misdemeanor; and shortly afterwards he was struck off the roll in this Court upon reading the rule for striking him off the roll of the Court of King's Bench.

In the course of the last term he was re-admitted an attorney of the Court of King's Bench, his innocence of the misdemeanor having been established to the satisfaction of the Judges; and now

Ludlow Serjt. moved that upon reading the rule for his re-admission in the Court of King's Bench, he should

1833.

Ex parte YATES.

should be re-admitted in this Court without payment of arrears of duty or fine.

PARK J. (a) Inasmuch as he was struck off the roll of this Court upon reading the former rule of the Court of King's Bench, I think we should now act on the present rule for his re-admission.

Rule absolute.

(a) *Tindal* C. J. was absent during the first four days of this term, on account of the decease of a near relation.

Jan. 12.

FAIRCLOTH *v.* GURNEY, Clerk.

The Court declined to hear a rule for setting aside an annuity, upon its appearing that the rule had not been obtained on behalf of the grantor, but on behalf of a party who had purchased the annuity from an assignee, and who raised objections to avoid completing his purchase.

STEPHEN Serjt. had obtained a rule *nisi* to set aside, upon a great variety of objections, an annuity granted by the Defendant.

Wilde Serjt., who now opposed the rule, said it appeared from the affidavits filed in support of the rule, that the annuity was secured on ecclesiastical property and certain policies of insurance in which the grantor had a reversionary interest; that the grantor having become insolvent, his assignee had made an arrangement with the grantee of the annuity to sell the annuity and the reversionary interest in the policies; that the whole had been sold by auction, after the annuity had been paid for several years without objection; and that the purchaser, becoming unwilling to complete his purchase, had resorted to a conveyancer to start objections. The conveyancer suggested no less than six, upon which he said the opinion of the Court must be obtained before the purchaser could safely proceed; whereupon this application

plication was made, *Gurney* contributing an affidavit that though he had not before been aware that there were legal objections on which he could set aside his grant, he had always esteemed himself grievously used by the grantee.

1833.
FAIRCLOTH v. GURNEY.

Wilde contended, therefore, that the application was a mere experiment to obtain the opinion of the Court upon a matter not in litigation, and that the Court would not entertain the motion unless it were made *bonâ fide* on the part of the grantor. That could not be the case here, for though he had contributed an affidavit of facts connected with the grant, he did not state that the application was made on his behalf. [*Alderson* J. It can scarcely be so, for it is his interest to uphold, not to defeat the sale of the annuity.]

The Court here called on *Stephen* to shew that the application was made *bonâ fide* on behalf of *Gurney*, and upon his failing to do so, declined to hear him further.

SHARP *v.* GREY. *Jan.* 11.

ASSUMPSIT against a coach proprietor and common carrier, for failing in his undertaking to convey the Plaintiff safely from *Chertsey* to *London*.

A coach proprietor is bound to convey his passengers in road-worthy vehicles, and if an accident happen from a defect in construction, the proprietor is liable, although the defect be out of sight and not discoverable upon ordinary examination.

The axletree of the Defendant's coach broke on the journey, whereby the Plaintiff was thrown off, his limbs fractured, and considerable loss and expence incurred in his cure.

It appeared that the axletree was an iron bar, which, excepting the arms projecting into the wheels, was enclosed

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SHARP v. GREY.

closed in a frame of wood consisting of four pieces bound together by clamps of iron. The clamps were fastened with screws.

Before the journey the Defendant's servants had examined this part of the vehicle in the usual way, when no defect was obvious to the sight; but upon investigation after the accident, a defect was discovered in that portion of the iron bar which, being embedded in the wood work, could only be examined by unscrewing the iron clamps, and taking off the wooden frame.

A mail contractor proved that it is not usual, previous to journies, to examine the iron of the axletree by opening its wooden frame, and that such a practice would be productive rather of insecurity than of safety: the maker of the Defendant's coach swore that the whole vehicle had been made of the best materials; that the coach was not new; but that the iron of axletrees was rendered more tough by use, and was less liable to accident after wear than at first starting.

Whereupon it was contended that there had been no want of due care on the Defendant's part, and that the Plaintiff's calamity was the result of inevitable accident, for which the Defendant was not responsible.

Tindal C. J. directed the jury to consider whether there had been, on the part of the Defendant, that degree of vigilance which was required by his engagement to carry the Plaintiff safely.

The jury having found for the Plaintiff, with 300*l.* damages,

Andrews Serjt. moved to set aside the verdict on the ground that the Defendant had conducted his business with all the caution that could be reasonably required; that the jury had been misdirected; and that the verdict was against evidence. A carrier of goods undertakes to deliver at all hazards, but a carrier of passengers is not responsible

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SHARP v. GREY.

responsible for accidents which happen in spite of every precaution. In *Christie* v. *Grigg* (*a*), it was held that the proprietor of a stage-coach was not answerable for any damage that might happen to a passenger from the coach being overturned by a mere accident.

PARK J. I am of opinion that no rule ought to be granted. This was entirely a question of fact, and the damages are not excessive. It is clear that there *was* a defect in the axletree; and it was for the jury to say whether the accident was occasioned by what, in law, is called negligence in the Defendant, or not. The Chief Justice expresses no dissatisfaction at the verdict, and it ought not to be disturbed.

GASELEE J. I am of the same opinion. The burthen lay on the Defendant to shew there had been no defect in the construction of the coach. Whether there had been or not, was a question of fact on which the jury have determined. In *Christie* v. *Grigg* the accident was occasioned by a kennel which crossed the road, and not by any defect in the vehicle.

BOSANQUET J. I am of opinion that no rule should be granted to disturb this verdict. The Chief Justice held that the Defendant was bound to provide a safe vehicle, and the accident happened from a defect in the axletree. If so, when the coach started it was not *road*-worthy, and the Defendant is liable for the consequence upon the same principle as a ship-owner who furnishes a vessel which is not sea-worthy.

ALDERSON J. I am of the same opinion: a coach proprietor is liable for all defects in his vehicle which can be seen at the time of construction, as well as for such

(*a*) 2 *Campb.* 79.

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SHARP v. GREY.

such as may exist afterwards and be discovered on investigation.

The injury in the present case, appears to have been occasioned by an original defect of construction; and if the Defendant were not responsible, a coach proprietor might buy ill-constructed or unsafe vehicles, and his passengers be without remedy.

Rule refused.

Jan. 14.

PALMER *v.* FENNING.

Insurance *Jan.* 28th on a yacht afloat, at and from *Bristol* to *London.* The vessel was not fitted out for sailing till the *May* following, and did not sail till the 17th of that month:

Held, that the circumstance of her being a yacht was no justification of such delay, and that the underwriters were discharged.

POLICY of insurance, effected *January* the 28th, 1831, on the *Ruby* yacht of thirty-seven tons, at and from *Bristol* to *London.* The yacht, which was lying in the float at *Bristol* at the date of the policy, did not sail till the 17th of *May*, and went down in the Channel three or four days after.

The Court having, after a nonsuit, refused a new trial in a former action on the same policy (See *ante*, vol. viii. p. 317.) the Plaintiff commenced the present action against another of the underwriters.

At the trial before *Taunton* J., last *Dorchester* assizes, it appeared, in addition to the facts above stated, that at the date of the policy, and, subsequently, the yacht was put up for sale at *Bristol*, and that the master proceeded from *London* to *Bristol*, and fitted out the vessel for the voyage, only a few days before the 17th of *May*.

Taunton J. reported that he left it to the jury to say whether the delay was, or was not, unreasonable; but did not, in terms, explain to them that a delay in sailing ought, in order to be justifiable, to be a delay for the purpose of the voyage, (no purposes of the voyage appearing,) except that the vessel, which was a pleasure yacht, should arrive safely at its place of destination.

The

The jury found for the Plaintiff; "considering that the vessel was a yacht which does not usually sail in the winter:" whereupon

Wilde Serjt. obtained a rule *nisi* for a new trial on the ground of misdirection, this Court having expressly decided, in *Palmer* v. *Marshall* (*a*), that no delay in sailing is justifiable except a delay for the purpose of the voyage; and that a yacht's waiting for the summer season is not a delay for the purpose of the voyage.

Bompas Serjt. who shewed cause, contended, as in *Palmer* v. *Marshall*, that the underwriters must be taken to know the usage with reference to the vessel insured, and that in the case of a yacht, waiting for the summer season, was, like waiting to avoid the hurricane months, in the *West Indies*, a delay for the purpose of the voyage. The whole was a question for the jury.

Wilde. Whether that would be reasonable delay for a yacht which would be unreasonable for any other vessel, is a question of law. But the fact that the yacht remained exposed for sale after the date of the policy, and that the master never quitted *London* for the purpose of fitting out till a few days before the 17th of *May*, is conclusive to shew that the delay here was not a delay for the purpose of the voyage.

PARK J. As I presided at the trial of *Palmer* v. *Marshall*, and directed the nonsuit in that cause, I am not disposed to say much on the present occasion.

Part of the proposition under discussion is, no doubt, matter of law; that is, whether the word *yacht*, in a policy, creates any exception from the rule which requires that a vessel shall sail within a reasonable time

(*a*) 8 *Bingh.* 317.

after

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after the policy is effected. In my opinion, and that of the Court, it does not. I adopt what was said in *Palmer* v. *Marshall* by my Lord Chief Justice and my brother *Alderson*. The Chief Justice said, "What I have to consider, therefore, is, whether any facts have been stated by the plaintiff to account for this delay. I find none suggested, beyond the circumstance that this vessel was described as a yacht upon the policy, and that yachts are usually laid up in the winter. But if the plaintiff meant to rely on that, he should have taken a policy adapted to his purpose. He might have insured his vessel *in* port for a definite time, and on the voyage to be commenced afterwards; instead of that he adopts a form of policy from which the underwriter must have understood that the vessel would sail within a reasonable time." That seems the right principle. My brother *Alderson*, after stating circumstances which might be deemed a reasonable ground of delay, puts it correctly that the delay must be for the purpose of the voyage. The cause has now been tried again by my brother *Taunton*, and all the arguments for the Plaintiff are answered by two facts which appear on that learned Judge's report of the trial; namely, that there having been an intention to sell the vessel, the captain was not sent down to *Bristol*, and no preparations were made for sailing till the month of *May*. Now it is clear insurance law, that on a policy at and from a port, the vessel ought to be ready to sail as soon as she reasonably can, and is not to lie in the port for months before she takes her departure. We have some difficulty in ascertaining what was the precise direction to the jury in this cause, but the learned Judge reports, himself, that he did not say that the delay, to be justifiable, must be a delay for the purpose of the voyage, except that the vessel, which was a yacht, should arrive safely at its place of destination. That certainly produced

duced an impression on the jury, because they found for the Plaintiff, "considering that the vessel was a yacht." It is impossible to sustain that verdict, for the jury should have been told that if that was the ground on which they determined, the verdict ought to have been for the Defendant. We think, therefore, that there should be a new trial; the costs to abide the event.

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GASELEE J. concurred.

BOSANQUET J. I am of opinion there has been a miscarriage in this cause, and that the verdict is inconsistent with the law laid down in *Palmer* v. *Marshall*. The only question is, whether this miscarriage is to be ascribed to an omission in the direction given to the jury by the learned Judge who presided at the trial. He reports that he did not expressly say the delay ought to have been a delay for the purposes of the voyage, (no purposes of the voyage appearing,) except that the vessel, which was a pleasure yacht, should arrive safe at its place of destination. But this Court has decided, that the circumstance of the vessel being a pleasure yacht is not a sufficient reason for the delay; and the mention of the term pleasure yacht seems to have misled the jury, for they found their verdict "considering that the vessel was a yacht." I think, therefore, there should be a new trial, but that, under the doubt as to the precise effect of the direction to the jury, the costs should abide the event.

ALDERSON J. I am of the same opinion as before, that this delay, to be justifiable, should have been a delay for the purpose of the voyage, as waiting for a wind, provisions, or the like. But, as the delay was *not* for the purpose of the voyage, I think the rule for a new trial should be made

Absolute.

1833.

Jan. 16.

FRASER *v.* CASE.

A *distringas* under 2 *W.* 4. *c.* 39. must be issued expressly for one of two purposes, either to compel appearance or with a view to outlawry; not in the alternative.

THE Defendant being applied to in *July* last for payment of a debt due to the Plaintiff, promised to settle it on the following *Saturday*.

The Plaintiff's clerk called on that day at the Defendant's house, when he was informed by the Defendant's wife that the Defendant was gone to *Africa*; and upon calling again on the 14th of *November* to serve him with a writ of summons, was informed he was still abroad.

Wilde Serjt. moved for a writ of *distringas* under 2 *W.* 4. *c.* 39. *s.* 3. in furtherance of the Plaintiff's proceedings.

Per Curiam. Under that statute a *distringas* may be obtained, either to compel an appearance, or with a view to outlawry. If the party is *not* abroad, the Court will not issue a *distringas* with a view to outlawry. If there is reason for thinking he *is* abroad, they will not issue one to compel an appearance. You must make out one case or the other; or at least, under the present circumstances, elect for which purpose the *distringas* shall issue.

Wilde elected a *distringas* to compel appearance.

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Jan. 21.

ASSUMPSIT for toll traverse. Plea, general issue.

At the trial the Defendant called several witnesses to prove that they had used the way in question, a public road passing the borough of *Northampton*, without payment of any toll; in some cases when no demand had been made, in other cases where toll had been demanded and refused. It was objected, by the Plaintiff, that these witnesses were incompetent, inasmuch as the verdict in the present case might be given in evidence against them, if an action should be brought against them for the toll; and the case of *Lord Falmouth* v. *George* (*a*) was relied upon in support of that objection. On the authority of that case *Tindal* C. J., before whom the cause was tried, allowed the objection, but gave the Defendant leave to move.

In an action for a toll claimed on a public road, persons who have refused to pay the toll are, from necessity, competent to give evidence, notwithstanding their interest in the result of the cause.

A verdict having been found for the Plaintiff, a rule *nisi* was obtained for a new trial on several grounds, and among them, on the ground that these witnesses ought not to have been excluded.

After hearing *Wilde* Serjt. against the rule, and *Jones* Serjt. in support of it, the Court requested that the question of evidence might be argued before all the Judges; accordingly, the day before this term commenced, fourteen of the Judges being assembled in the Exchequer Chamber,

Chilton, on this point only, again shewed cause against the rule for a new trial.

The witnesses in question were properly excluded,

(*a*) 5 *Bingh.* 286.

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because the verdict in this cause would have been evidence against them, so that they had an immediate interest in the result of the cause. That has always been deemed an insuperable ground of exclusion. *Gilb. Evid.* 107., *Bull. N. P.* 284., *Walton* v. *Shelley* (*a*), *Rex* v. *Bray* (*b*), *Duke of Somerset* v. *France* (*c*), *Hockly* v. *Lamb* (*d*), *Harvey* v. *Collison* (*e*), *Anscomb* v. *Shore* (*g*), *Earl of Clanricard* v. *Denton* (*h*), *Bent* v. *Baker* (*i*), *Smith* v. *Prager* (*k*), *Rhodes* v. *Ainsworth* (*l*), *Wyndham* v. *Chetwynd.* (*m*) To say nothing of *Lord Falmouth* v. *George*, which may be considered as under reconsideration on this occasion, the present case cannot be distinguished from *The Company of Carpenters, &c. in Shrewsbury* v. *Hayward* (*n*), where it was held that a person who had acted in breach of an alleged custom was not a competent witness to disprove the existence of the custom.

It may be urged on the other side that such evidence ought not to be excluded in the case of public rights, which affect all the king's subjects; but that argument is met by the case just cited, in which the custom set up by the Plaintiffs affected all the king's subjects. The only exception to the rule of exclusion in cases of interest, is that pointed out by *Buller* J. (*o*), namely, that a party who has an interest will be admitted where no other evidence can reasonably be expected: *Gilb. Evid.* 114., *Evans* v. *Williams* (*p*), *Lock* v. *Hayton* (*q*), *Goodtitle* v. *Welford.* (*r*) Here other evidence might have been adduced. The servants of those whose car-

(*a*) 1 *T. R.* 296.
(*b*) *Cas. Temp. Hard.* 360.
(*c*) 1 *Str.* 661.
(*d*) 1 *Ld. Raymd.* 731.
(*e*) 1 *Selw. N. P.* 439.
(*g*) 1 *Taunt.* 261.
(*h*) 1 *Gwill.* 360.
(*i*) 3 *T. R.* 27.
(*k*) 7 *T. R.* 62.
(*l*) 1 *B. & Ald.* 87.
(*m*) 1 *Burr.* 414.
(*n*) *Dougl.* 373.
(*o*) *Bull. N. P.* 289.
(*p*) 7 *T. R.* 481 *n.*
(*q*) *Fortesc.* 246.
(*r*) *Dougl.* 140.

riages

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riages passed the gate might have been called, or the witnesses might have paid under protest: *Rex* v. *Carpenter* (*a*), *City of London* v. *Water Bailiff.* (*b*)

Sir *James Scarlett* in support of the rule. Witnesses are not excluded because the verdict in the cause may be evidence for or against them, but because they have an interest in the result of the cause: the admissibility of the verdict for or against the witness is often a test of the existence of the interest; but it is the interest which disqualifies him, and not the circumstance that the verdict may be given in evidence for or against him. Now, to the rule of incompetency from interest, and to the admissibility of a verdict in evidence, *Read* v. *Jackson* (*c*), there are several admitted exceptions. One of them is the case of a claim which affects all the king's subjects; as a claim to toll on a public road. The interested witness, there, is a witness of necessity, because none can be found who are at once not interested, and have any correct knowledge about the matter in dispute. In the present case the servants of those whose carriages passed without impediment might not know that their employers paid a composition for passing: the employers alone could state the fact correctly. Claims against the public may be divided into two classes; 1. those which affect a portion of the public, as the inhabitants of a manor, parish, or township, or persons of a particular vocation; 2. those which affect all the king's subjects. In the first class the testimony of interested witnesses is excluded by common law, because it is possible to procure other, and less exceptionable testimony; but in claims which fall under the second class, witnesses are admitted notwithstanding their interest, from the impossibility of

(*a*) 2 *Show.* 47. (*b*) 1 *Ventr.* 351. (*c*) 1 *East*, 355.

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procuring other testimony. This distinction reconciles all the cases; for *The Company of Carpenters in Shrewsbury* v. *Hayward*, and *Lord Falmouth* v. *George* may be ranged within the first class. To receive the evidence of those only who paid the toll would be to receive evidence only on one side.

Cur. adv. vult.

The judgment of the Court was now delivered in C. B. by

PARK J. This was an action of *assumpsit* for toll for passing through the borough of *Northampton*, tried before the Lord Chief Justice of this Court, when a verdict was found for the Plaintiff. A motion was made by leave reserved at the trial, to set aside this verdict upon several grounds, upon which it is not now necessary to give an opinion. But there is one, upon which I am now to proceed to deliver the unanimous judgment of this Court: it is also an opinion in which all the Judges of *England* concur. At the trial of this cause several witnesses were proposed to be called on the part of the Defendant, to prove that they had used the way in question without payment of any toll, in some cases where no demand had been made, and in other cases where the toll had been demanded, and refused to be paid. This evidence was objected to as incompetent by the counsel for the Plaintiff, inasmuch as the present verdict, it was contended, might be given in evidence against them, if an action should be brought against them for the toll. In support of this objection, the case of *Lord Falmouth* v. *George* (*q*) was relied upon, and much pressed upon the Chief Justice: and I believe I may say in his presence, that although his leaning was against the objection made to the incompetency of the

(*q*) 5 Bingh. 286.

witness,

witness, yet, upon the authority of that case, his Lordship allowed it, giving the Defendant leave to move the Court. The question then is, are these witnesses admissible or not?

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This case, and the question arising upon this point, are of great importance, and of frequent occurrence, and therefore the Court were desirous of having the point set at rest upon the highest judicial authority. Accordingly, we requested the Judges of the other courts of *Westminster Hall* to permit this single point to be heard before them; and the day before this term it was accordingly argued by one counsel on each side, before fourteen Judges, and they agree unanimously; and the Lord Chief Justice of this Court, being unavoidably absent at the argument, authorizes me to say that he fully concurs.

Whether it would be possible to support the case of *Lord Falmouth* v. *George*, by supposing it savoured more of a private than of a public right, I do not think it worth while to discuss. Because, in *this* case of *Lawrence* v. *Lovell*, there can be no doubt that this was a matter in which every subject of the king has an interest; and if any one man, because he has passed that way unmolested or resisting, and therefore having an interest, is rejected, every individual in the kingdom is equally exceptionable. The Court, and the other Judges therefore wish this case to be placed upon this broad ground, that this is a public right, in which all mankind are interested; and if such an objection to witnesses were allowed to prevail, a man would have only to set up a toll or any other claim as against all the world, and no man who had used the way, could be called to controvert or contradict the claim, although he had uniformly resisted the yielding to such a demand. It is of course, therefore, as it seems to us, that such witnesses, of necessity, must be

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admissible. It was said at the bar the other day, that the servants of the masters, whose carriages passed, might be called. But that would not be sufficient, for it would then be alleged, even if the servants swore that they passed without paying, that it by no means followed that the masters did not compound for the tolls, a practice not uncommon, and of which the servants might not be cognizant. The only persons who could give satisfactory proof, are those who could absolutely prove that they being the owners of carts or other carriages, continually passed; and that no demand had ever been made upon them; or, if made, had been uniformly resisted by them. It appears, therefore, that this case falls expressly within Mr. Justice *Buller*'s second exception to the general rule, that no person interested can be a witness; namely, that a party, who has an interest, will be admitted, where *no other evidence can reasonably* be expected. (*a*) Now how can any other evidence be reasonably expected to rebut a claim made against *every* individual subject of the realm, but that of *some* of the subjects of the king?

The Court has been much pressed with the case of *The Company of Carpenters, &c. in Shrewsbury* v. *Hayward* (*b*), where it was held, that a person who had acted in breach of an alleged custom was not a competent witness to disprove the existence of the custom; namely, that *he had worked, being a resident in Shrewsbury, without molestation as a carpenter there, although he was not free of the company, nor an apprentice nor journeyman.* On that case it is to be observed, that it was not a case affecting *all* the king's subjects, but only a particular class of tradesmen, in a particular town: in the next place it was decided expressly on the ground that *they* were not witnesses of necessity, for Mr. Justice *Buller*

(*a*) *Bull. N. P.* 284. (*b*) *Doug.* 373.

says

says "the objection to the witness produced for the Defendant is certainly decisive: for it is not true that he could have had no other sort of witnesses. The employers might have been witnesses."

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The result of the whole is, therefore, that we are of opinion, that the right claimed is a *public* right, in which all the king's subjects are interested; and that consequently the right on the one hand, and the resistance on the other, can only be substantiated or resisted by the subjects of the king, who are all equally interested; and, therefore, the rule for the new trial must be made absolute.

Rule absolute.

(IN THE EXCHEQUER CHAMBER.)

BALME and Others, Assignees of BANKHART and BENSON, Bankrupts, *v.* HUTTON, JEWISON, INGHAM, WOOD, and Others.

A sheriff who has seized goods under a *fi. fa.*, and has sold and delivered them after a secret act of bankruptcy committed by the Defendant, but before a commission issues against him, is liable in trover to the assignees under the commission.

UPON error from the Court of Exchequer, the judgment of this Court was now delivered as follows: —(*a*)

PATTESON J. This was an action of trover by the assignees of a bankrupt firm, in which the jury found a special verdict as follows: —

C. Bankhart and *W. Benson*, the bankrupts, for several years before and up to the time of the issuing the commission

(*a*) This case was argued in *Trinity* vacation.

The arguments are so fully stated in the judgment, that it would be improper to repeat them here.

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sion hereinafter mentioned, carried on the business of worsted spinners, in partnership, at *Bowling*, within the honor of *Pontefract*, in the county of *York*. On the 27th of *October* 1825, *Bankhart* and *Benson* were indebted to the Defendants *H. W. Wood*, *J. W. Wood*, and *M. W. Wood*, in a sum of money exceeding 3500*l.* for wool sold and delivered, and upon that day, at the request of the said Messrs. *Wood*, executed a warrant of attorney for securing that sum, and such further advances as in the whole should amount to a sum not exceeding 5000*l.*, which warrant of attorney was filed within twenty-one days from the date thereof, pursuant to the statute 6 G. 4. *c.* 16.; and judgment by *nil dicit* was entered up thereon on the 14th of *November* following. On the 31st of *December* 1825, the said *C. Bankhart* and *William Benson*, being traders, and indebted to the petitioning creditor in a debt sufficient to support the after mentioned commission, committed an act of bankruptcy. On the 25th of *January* 1826, the Defendant *Ingham* (*Jewison* then being chief bailiff of the honor of *Pontefract*, within which honor he has the execution of all writs, and appoints his own deputies, from whom he takes bonds with sufficient sureties to indemnify him from the acts of such deputies), by virtue of a warrant directed to *Jewison* and his deputy (Defendant *Ingham*), by Defendant *Hutton*, the then sheriff of the county of *York*, founded on a writ of *fieri facias* issued at the suit of the said Defendants *H. W. Wood*, *J. W. Wood*, and *M. W. Wood* against the said bankrupts, under the judgment aforesaid returnable on *Monday* next after eight days of the *Purification*, and indorsed to levy 1521*l.* 12*s.* 10*d.*, besides, &c., seized in execution certain machinery and utensils of the said bankrupts, in a mill occupied by them in *Bowling* aforesaid. On the same day a valuation of the said machinery and utensils, together with the said bankrupt's tenant-right in the said

mill,

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mill, was made by the Defendant *Ingham*, amounting altogether to the sum of 1485*l.*, and the said machinery and utensils, and tenant-right, were, on that day, purchased at such valuation from the said *Ingham*, acting on behalf of the chief bailiff, by one *Barker*, a clerk or bookkeeper of the said Messrs. *Wood*, but no money was paid by *Barker* or *Wood* to *Ingham*, except the sheriff's poundage and other costs of the levy. Immediately upon the sale, *Barker* took possession of the mill, machinery, and utensils on behalf of Messrs. *Wood*, and retained possession until the 17th of *February* following, when the machinery and utensils were sold by public auction for the sum of 964*l.* 14*s.* 6*d.*, the tenant-right in the mill remaining unsold, but being of little or no value, and the proceeds of such sale were paid over by *Barker* to Messrs. *Wood*. On the day of the sale to *Barker*, Messrs. *Wood* agreed to indemnify the Defendant *Ingham* from any action for making the levy, and a bond of indemnity was afterwards executed. On the 21st of *February* 1826, a commission of bankrupt issued against *Bankhart* and *Benson*, under which they were declared bankrupts, on the 24th of the same month. Neither the sheriff nor the chief bailiff, nor *Ingham* knew or had any notice of any act of bankruptcy by *Bankhart* and *Benson* before the return of the writ of *fieri facias*.

The Court of Exchequer has given a very elaborate judgment, and has decided that the verdict should be entered for the Defendant *Jewison*, and against the Defendant *Ingham*. Upon which judgment a writ of error has been brought. The decision against the Defendant *Ingham* proceeds on the ground that he, being the bailiff who executed the writ of *fieri facias*, took an indemnity from the execution creditor, and is therefore identified with him. But the Court held that the Defendant *Jewison*, the chief bailiff, whose officer *Ingham*

was,

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was, is not affected by this circumstance. I confess it appears to me, as at present advised, that if *Ingham* be identified with the execution creditor in consequence of what he has done in the course of executing the writ, *Jewison* is so likewise. *Jewison* would be liable for all acts done by *Ingham* as officer, even for any extortion committed by *Ingham*, although contrary to his express orders. *Jewison* can have the benefit of the indemnity taken by *Ingham*, and is, in my apprehension, exactly in the same condition as *Ingham*. However, as the other point in this case is the most important one, I will proceed to examine it, having stated only this much upon the point of indemnity, lest I should be supposed to agree entirely with the Court of Exchequer upon it.

The principal question, then, is this, Is a sheriff liable to an action of trover at the suit of the assignees of a bankrupt, where, upon a *fieri facias* against a trader who has committed a secret act of bankruptcy, of which the sheriff is wholly ignorant, he seizes and sells? I am of opinion that he is liable. It has been so considered for a great length of time, and though I admit that the case of *Cooper* v. *Chitty*, reported in 1 *Burrow*, 20., and much more intelligibly, as I think, in Lord *Kenyon*'s notes, 395, does not, necessarily, decide the point, because, in that case, the sheriff sold the goods after a commission of bankrupt had issued; yet the general understanding of the profession has long treated that case and the subsequent practice as decisive of this question. Accordingly, in the case of *Lazarus* v. *Waithman* (*a*), the Court of Common Pleas expressly so held; and in that case the old authorities, and particularly *Baily* v. *Bunning* (*b*), were cited by counsel. Afterwards in *Price* v. *Helyar* (*c*) the Court of Common Pleas again decided in the same

(*a*) 5 *B. Moore*, 313.
(*b*) 1 *Lev.* 173.
(*c*) 4 *Bingh.* 597. 1 *Mo. & P.* 541.

manner

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manner on the same ground, and according to the report in *Moore* and *Payne* the counsel for the Defendants cited *Baily* v. *Bunning*. The Court of Exchequer had also held the same doctrine some time before in the case of *Potter* v. *Starkie* (*a*), and also in *Lazarus* v. *Waithman*. I do not think it necessary to enter into a full examination of the reasoning of Lord *Mansfield* in *Cooper* v. *Chitty*. I agree in much, though not in all, that is said on that subject, in the judgment of the Court of Exchequer in this case, but I dissent from the conclusion which is drawn in that judgment. Looking at the subsequent authorities, and at the uniform practice in modern times, I cannot consider this question as *res integra*, and should not think myself justified in overruling the decisions of so many learned Judges, even if I felt that in the absence of such decisions my view of the law would probably be different. But I by no means say that it would be different. The first authority, namely, *Baily* v. *Bunning*, is cited as having determined this point the other way. Now if I am not bound by the several modern decisions on the subject, I certainly am not bound by the authority of *Baily* v. *Bunning*, badly and imperfectly reported as it is in *Levinz*, *Siderfin*, and in *Comberbach*; and impossible as I find it to satisfy my mind on what ground the Court in that case really did proceed. The special verdict in that case, which was an action of trover against the judgment creditor and the bailiff of a liberty having the return of writs, is plainly imperfect, for it finds only a demand and refusal, but not a conversion, whereas it is common learning that a demand and refusal are evidence only of a conversion, and that the jury must themselves draw the conclusion. Again, the verdict puts the question on the taking, and according

(*a*) 4 *M.* & *S.* 260.

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to the Reports it should seem that the Court proceeded on the ground that the taking was not unlawful, which is frequently not the real point in trover, for the taking may be lawful, and yet there may be a subsequent unlawful conversion. The verdict is general, not guilty, as regards the execution creditor, and rightly so, for it is not found that he interposed in the seizure; and it is expressly found that the goods still remained in the bailiff's hands, not sold nor delivered over to the execution creditor; and yet *Baily* v. *Bunning* has been mentioned by *Levinz* as an authority to shew that the officer shall not be charged, when perhaps the party shall; — so inaccurate are the Reports of that day respecting this case, and so conclusive to my mind that no reliance can be placed on *Baily* v. *Bunning* as establishing any point at all. *Letchmere* v. *Thorowgood* (a) has been cited; but, if possible, it is worse reported than *Baily* v. *Bunning*: the only point was there, that a man shall not be made trespasser by relation; a point confirmed in *Smith* v. *Milles*. (b) The decision in the action of trover afterwards brought in *Letchmere* v. *Toplady*, is plainly bad law. *Cole* v. *Davies* (c) is but a *Nisi Prius* decision.

Take this case, then, upon legal principles, independent of all authority. The bankrupt acts say that the commissioners shall deal with all the personal property of the bankrupt of which no execution is served and executed at the time he becomes bankrupt. How deal with it? By assigning it to the assignees. In order to effectuate this intention of the legislature, it was absolutely necessary to hold that the property was in the assignees by relation from the time of the act of bankruptcy, otherwise there would have been no mode of recovering the personal property which had

(a) 3 *Mod.* 326. and other places.

(b) 1 *T. R.* 475.

(c) 2 *T. R.* 729.

been

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been disposed of between the act of bankruptcy and the assignment. This relation is created by the statutes of bankrupt in effect, as much as if it had been expressly enacted, and manifestly binds all persons except the king, who is not named in these statutes. Now the action of trover, which is the form of the present action, is founded on property, and as the assignees have the property by relation, it follows that they can maintain this action against any person who has converted the goods in the interval between the act of bankruptcy and the action, subject always to the limitation of two months introduced by statute 49 *G.* 3. *c.* 121. *s.* 2. All the cases from the time of the bankrupt acts of *Elizabeth* and *James* I. shew this; and indeed it is on this principle only that the Court of Exchequer in the present case have given judgment against the execution creditor and the bailiff *Ingham*. The action of trespass is very different, it is founded not on property but on possession; and where there is no actual possession, but right of property, is said to draw to it possession, that is only where the plaintiff has a right of possession at the time of the trespass; here he had no such right, except by relation, and the cases establish that a man shall not be made a trespasser by relation. There is reason in such a rule, for in trespass the damages are unlimited: in trover they are limited to the value of the property.

It being, therefore, clear that the Plaintiffs had by relation such a property as would maintain trover against all persons but the king, the question in this case, as it seems to me, is reduced to this, whether the character of the sheriff affords a defence to the action. The bankrupt acts contain no clause protecting the sheriff; they speak of all persons being bound who claim under the bankrupt: but it is contended that the sheriff does not claim under the bankrupt: yet it is admitted that the execution creditor who puts the sheriff

in

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in motion, does claim under the bankrupt, and that the vendee from the sheriff also claims under him; but it is said that the sheriff does not. I cannot assent to this doctrine at all.

It is said to be hard on the sheriff: but if the law be clear, any hardship arising from it is immaterial; and it is not found practically hard, for the offices of under sheriff and of bound bailiff are coveted, notwithstanding the hardship which has prevailed many years. It is said that the sheriff is invincibly ignorant of the facts: so is the execution creditor; yet he is not excused if he join in the execution; ignorance therefore alone will not do. Again, the sheriff is often as invincibly ignorant in cases of blls of sale, whether they be fraudulent or not, yet he is obliged to run the risk: nay more, where he knows of an act of bankruptcy he is still obliged to seize under a *fieri facias*, and formerly was obliged to sell, for *non constat* that any commission will issue; which is quite as hard as being obliged to act in ignorance. Whatever hardship he may have been under formerly, he is under very little since 49 *G.* 3. *c.* 121.: he can always enquire whether any act of bankruptcy has been committed; and if he has reason to suspect that there has, he can apply to the Court for protection for two months, after which he is safe.

But it is said that the law in other cases makes a distinction between a sheriff and a party. As, for instance, that a sheriff may justify under a writ of execution, but the party must shew not only a writ but a subsisting judgment. No doubt that is so; and why? Because the party in the cause who is liable only in case he has been personally active in the seizure, or has taken the goods or their produce from the sheriff, yet having put the sheriff in motion, that is, having sued out the writ, if he become liable at all, must shew a

cause

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cause for suing out the writ; and it is obvious that the writ itself would shew no cause; whereas the sheriff does nothing till after the writ is put into his hands; and acts professedly in obedience to the writ. The difference in the requisites of a justification between the sheriff and the party arises not from the character of the sheriff, but from the stage of the proceedings at which they respectively interfere. The writ commands the sheriff to take goods of *A.*; he takes goods which had been the property of *A.* and are still in his possession, though in point of law they have ceased to be his property, if certain contingent events happen; but no other person at that time has the right of possession; the sheriff, therefore, is not liable to be sued in trespass by the person who, by the happening of subsequent events, turns out to have had in law the property of the goods at the time of the seizure; neither is the execution-creditor liable in trespass; but both the sheriff and the creditor, if he takes the proceeds, are liable in trover to render the value of the goods to the person whose property they turn out to be. I see neither hardship nor injustice in this, nor any thing contrary to the usual course and maxims of the law. If, then, this were *res integra*, I should think the sheriff liable, and much more do I so think when I find the modern authorities so deciding, even if I concede and were satisfied, which I am not, that the more ancient ones are the other way. I am therefore of opinion that the judgment of the Court of Exchequer in this case, as regards the Defendant *Jevison*, ought to be reversed.

TAUNTON J. Two questions have been raised on behalf of the Defendants in error in this case; the one, that the property in the goods and chattels seized remained in the bankrupts *Bankhart* and *Benson* until the assignment by the commissioners under the commission

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of bankrupt; that at the time of the seizure, therefore, they were their goods and chattels; that in making the seizure *Jewison*, the chief bailiff of the honor, and *Ingham*, his deputy, were acting in strict obedience to the writ of *fieri facias*, which commanded them of the goods and chattels of *Bankhart* and *Benson* to make the money to be levied; and therefore that *Jewison* (for of *Ingham* there was no question in consequence of his having taken an indemnity from the judgment-creditor) is not liable to this action. The other question was, whether, admitting the doctrine of relation to be applicable to the judgment-creditors, it could be so with respect to *Jewison*, who was a public officer, and supposed to be entitled to peculiar protection, and not capable of being considered as a wrong doer when acting in obedience to his writ and in ignorance of any act of bankruptcy committed. If either of these questions be answered in favour of the Defendants in error, the judgment ought to be affirmed; but, upon a full consideration of the subject, I am of opinion that both points are against them, and that the judgment of the Court below ought to be reversed.

In giving my reasons for the conclusion at which I have arrived, I do not mean to go into the cases at any length; they are so fully discussed in the very learned and elaborate judgment of the Court of Exchequer, and in the arguments at the bar, and the subject itself, speaking generally, is so familiar to the mind of every lawyer, that this is wholly unnecessary.

Upon the first point, I admit that the property in the goods, according to the case of *Cary* v. *Crisp* (*a*), is not transferred out of the bankrupt before assignment by the commissioners; but though this be so, it is most clear, and has been settled by a long series of decisions,

(*a*) 1 *Salk.* 108.

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that when an assignment is made under a good commission of bankruptcy, it relates back to the act of bankruptcy committed, and avoids all mesne acts. The law on this subject is thus stated by Lord *Hardwicke* in the case of *Billon* v. *Hyde* (*a*): "By the act of bankruptcy all the real and personal estate vested in the assignees, and the property vested in them from the time of the act committed, and that may go back to a great length of time, and it overcharges all those acts without regard to the fairness or fraud in them, so that a sale of goods by the bankrupt after the act committed is a sale of their property, and for which they may maintain trover. So it is as to the payment of money; and this was the intent of the act of parliament, the statute of *Jac.* 1. being that this shall not extend to the prejudice of any debtor of the bankrupt who paid his debt after the act committed, without knowing of it. This relation the assignment has, does not only overcharge acts done *in pais*, and contracts entered into by such person's having committed an act of bankruptcy, but also acts on record, and legal acts done by him, such as judgments. So that if execution is taken out after the act committed, upon a judgment before, that execution is undone and set aside. It is said that this rule, founded on this act of parliament, is contrary to the general reason of the law, which says that fictions of law and legal relations shall not enure to the wrong of any one; which is a general rule, invented to support the right and equity of the case. But the reason of taking this case out of that rule is plainly this, and the law did intend it on this general rule, that it is better to suffer a particular mischief than an inconvenience; and the legislature foresaw there would be a particular mischief, which they cured by that proviso; but did not extend

(*a*) 1 *Ves.* 328.

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it farther, because the inconvenience, on the other hand, of suffering bankrupts to dispose of their effects by contracts or judgments would put it in their power to defeat their just creditors of their debts, so as it would be difficult commonly to find out whether there was a mixture of fraud, the legislature thought it better to lay down that general rule." Lord *Mansfield*, in *Cooper and Another* v. *Chitty* (*a*), expresses himself in these words: "This relation, the statutes concerning bankrupts introduced to avoid frauds. They vest in the assignees all the property that the bankrupt had at the time of what I may call the crime committed, (for the old statutes consider him as a criminal), they make the sale by the commissioners good against all persons who claim by, from, or under the bankrupt after the act of bankruptcy, and against all executions not served and executed before the act of bankruptcy." It must be particularly recollected that this relation takes effect, not from the common law, but by statute; and the necessary result is, that though at the time of the execution executed goods seized under an execution may ostensibly have been the goods of the bankrupt, and in truth would have been, and have continued to be so, notwithstanding a prior act of bankruptcy committed, if no commission was sued out thereon; yet if a good commission be taken out, and an assignment executed, whoever possesses himself thereof at any interval of time between the act of bankruptcy and the assignment is considered as possessing himself of the property of the assignees. He therefore, whether judgment-creditor, or sheriff, or bailiff, or any other person, who in such a case takes the goods apparently of *A.*, the bankrupt, has, in legal effect, taken possession of the goods of *B.*, the person who afterwards becomes assignee, and is liable to an

(*a*) 1 *Burr.* 31.

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action at the suit of *B.*, the subsequent assignee, for so doing, unless he be protected by some peculiar privilege.

This brings me to the second question, whether a sheriff has such a privilege; so that, under the same circumstances, ignorance of any act of bankruptcy committed being one, the judgment-creditor will be liable and the sheriff will not. It is said that he has, because he is the king's officer, and that he is acting only in obedience to the writ which he is obliged to execute.

Now, if there be an exception to the general rule in the instance of a sheriff, it is an implied one, for there is none to be found in the statute. The words of the 6th *G.* 4. *c.* 16. *s.* 12., which are the same as those in the 13 *Eliz. c.* 7. *s.* 2., are general, that the commissioners shall have full power and authority to take order and direction of all the bankrupt's lands, which he shall have in his own right before he became bankrupt, and of all his money, goods, chattels, &c., and to make sale thereof, or otherwise order the same for satisfaction and payment of the creditors.

I confess I can see no necessity for making this exception in favour of the sheriff. He is the immediate officer of the king and all his courts, to execute the writs of the common law, and for doing this he is entitled, on the one hand, to certain allowances and fees, and subject, on the other, to many perils and liabilities; and to these perils and liabilities, though they may, in particular instances, work great injustice, he is exposed for the public good. If we were to confine the liabilities of sheriffs to cases of personal misconduct or default in them or their officers, we should overturn the settled administration of law upon the subject, and throw every thing into confusion. Nothing can be more severe than the responsibility of sheriffs in the case of bail. If he refuses sufficient bail

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he may have an action brought against him by the defendant, and if he takes it, and the defendant in the suit does not appear according to the exigency of the writ, which he can only do by putting in and justifying bail above, he may be attached by the plaintiff. So, he is identified with the bailiffs, and liable for all their acts, though beyond the scope of their authority, and contrary to their duty, as voluntary escapes, extortion, and the like. In the one instance, without the means of knowledge, he is bound to judge of the sufficiency of persons tendering themselves as bail, and in the other, he is driven to protect himself by a bond from sureties for the good conduct of his officers, and to rely upon such security, which may turn out to be worthless, for indemnity. So, in executing process, whether against the person or against goods, he acts at his peril, and is responsible if he makes any mistake, however innocently, with respect to the identity or the property. This has been carried so far, that in a case where he had seized goods under a *fieri facias* against *A.*, in a house where *A.* and the plaintiff lived together as man and wife, and the plaintiff afterwards discovered that when she intermarried with *A.* he had another wife living, it was held that the plaintiff might recover the value of the goods against the sheriff, they having been her property before the marriage; it not appearing that the plaintiff knew, at the time of the execution, that *A.* had another wife living. *Glasspoole* v. *Young and Others* (*a*). All this apparent injustice has its origin in, and can be excused only by, the apprehension of the numberless frauds, oppressions, and inconveniences that would otherwise ensue.

But in favour of the sheriff upon this occasion, the case of *Bailey* v. *Bunning* (*b*) has been cited. I admit this case as reported in *Levinz*, to be *primâ facie* an authority

(*a*) 9 *B.* & *C.* 696. (*b*) 1 *Lev.* 173. *Siderfin*, 272.

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for the sheriff, though in *Siderfin* the reporter subjoins a query with this remark, " For it was affirmed that the practice is that the bailiff shall be found guilty if the party was then a bankrupt." But it may be observed that this appears to have been the first case decided upon this point of relation after the statutes 13 *Eliz.*, 1 *Jac.* 1., and 21 *Jac.* 1., and was decided at the time when the bankrupt law was not moulded, partly by decisions of courts of justice, and partly by subsequent statutes, into that more perfect system which it afterwards attained. It is still more material to observe, that, on referring to the original record, it appears that the special verdict does not expressly find any conversion by the Defendant *Bonynge.* The action was trover against the judgment-creditor *Mawley* and the officer *Bonynge.* The former was found not guilty, and with respect to the latter the jury found that, by virtue of the warrant and writ he caused to be made, the goods, chattels, and monies in the count mentioned, and which goods, chattels, and monies still remain in the hands of the said *Thomas Bonynge*, neither sold nor delivered to the said *William Mawley.* They afterwards further said that *Richard Bayliss* (the Plaintiff) demanded of the said *Thomas Bonynge* the monies, goods, and chattels in the count mentioned, and that *Thomas Bonygne* refused, upon his request, to deliver them to *Bayliss.* But whether, upon all the matters found, the monies, goods, and chattels aforesaid were well taken by *Bonynge* by virtue of the writ of execution, the jurors are ignorant, and pray the advice and consideration of the Court; and if it shall seem to the Court they were not rightly taken, then *Thomas Bonynge* is guilty of the premises laid to his charge, but if rightly taken, then not guilty. A demand and refusal, therefore, are found, but no sale and express conversion, and the question referred to the Court is merely as to the taking. This, I think, con-

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siderably impugns the authority of the case, inasmuch as the conversion, which is the gist of the action, is not found; and from the contradictory accounts of the several reports of this case, it is difficult to ascertain the ground of the decision. The case of *Turner* v. *Fidgate* (*a*) was also cited as illustrating, by the reporter's note, and not by the decision itself, the difference between charging the officer and charging the party. It was there held, though *Twisden* was not satisfied, that the party who levied upon a judgment that was afterwards vacated, was a trespasser by relation. This was the only point decided; and the reporter subjoins a note of observation that the action was brought against the party and not against the sheriff, who had the king's writ for his guarantee, and refers to *Bailey* and *Bunning's* case. This case, therefore, and that also of *Philips* v. *Thompson* (*b*), in which the ground of the decision in *Bailey* v. *Bunning* is simply stated, are not additional authorities, because this very point was not adjudged in either. Of *Letchmere* v. *Thorogood* (*c*) it is sufficient to say that the form of action there was trespass, and not trover, and the only point decided was, that a man shall not be made a trespasser by relation: and it is a very different thing to make a sheriff answerable in trover, where the value of the property only is the usual measure of damages, and in trespass, where circumstances of aggravation may swell their amount. It by no means follows, of necessity, that the Court would have holden that trover would not lie, because they held that trespass did not, though it is probable that, at that day, founding themselves upon *Bailey* v. *Bunning*, they might have so held; and it is not immaterial to observe, that the distinction in this respect between trespass and trover is

(*a*) 1 *Lev.* 95.
(*b*) 3 *Lev.* 193.
(*c*) 3 *Mod.* 236. 1 *Show.* 12. *Comb.* 123.

particu-

particularly pointed out by Lord *Mansfield* in the case of *Cooper* v. *Chitty*, and is the particular ground of decision in the case of *Smith and Another, Assignees*, v. *Milles* (*a*). As to the case of *Cole* v. *Davies and Others* (*b*), Lord *Mansfield*, in *Cooper* v. *Chitty* (*c*) says, "These notes were taken when Lord *Raymond* was young, as short hints for his own use, but they are too incorrect and inaccurate to be relied on as authorities." And the resolution relied on in the present case is considered by him not to have been warranted by the case then in judgment, but to have been a mere obiter reference to the determination in *Bailey* v. *Bunning*. In *Aldridge* v. *Ireland* (*d*) it was not necessary to decide this question, although it arose, the sheriff having been indemnified; and the same observation, that there was no decision on this point, may be applied to *Coppendale* v. *Bridgen and Another* (*e*); although, if one were inclined critically to examine the language used by part of the Court, Mr. Justice *Foster*, if the sheriff there had returned *nulla bona* on the day of the return of the writ, that would not have been a false return, though the act of bankruptcy on that day was incomplete, because the relation is made to be to the time of the first arrest by the express words of the statute. But I by no means rely upon this, inasmuch as the other Judges had doubts about the point.

The case, then, of *Bailey* v. *Bunning*, such as it is in *Levinz*, is, in effect, the only one solitary decision purporting expressly to be in favour of the officer. I agree that, according to the report of the case of *Cooper* v. *Chitty*, in *Burrow*, that case is no authority for the present. Lord *Mansfield* there is reported to have made two points; the first, whether or not there was sufficient pro-

(*a*) 1 *T. R.* 475.
(*b*) 1 *Ld. Raymd.* 724.
(*c*) 1 *Burr.* 36.
(*d*) Cited in 1 *Taunt.* 273.
(*e*) 2 *Burr.* 814.

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perty in the plaintiffs, as assignees, to enable them to maintain the action, and, secondly, whether the defendants had been guilty of a wrongful conversion; and the decision turned upon this, that the sale having been after the commission and assignment, which were both notorious transactions, the conversion was wrongful. It is true, that in *Blackstone*'s report of the case, 1 *Blac.* 69., Lord *Mansfield* is reported to have said, "But had the sale been immediately after the seizure, still the sheriff would have been liable." Of these reports, that of *Burrow* is probably the more correct, as it is certainly the most elaborate, and perhaps received the correction of Lord *Mansfield* himself. But notwithstanding *Cooper* v. *Chitty* be no direct authority against the sheriff, in a case where the seizure and sale are both before the commission, or notice of it, yet it appears to me to be pretty clear that, soon after that case, an opinion grew up in the profession that the sheriff was equally answerable in both cases, upon the ground that, from the act of bankruptcy, the property, by relation, vests in the assignees; and that any sale or disposition of it afterwards, without their privity, must be a wrongful conversion by whomsoever made. The observations which fell from the Court in *Hitchin and Others* v. *Campbell* (*a*), determined in *Trinity* term 12 *G.* 3., only sixteen years after the decision of *Cooper* v. *Chitty*, afford strong proof of this; and in *Lazarus and Waithman* (*b*), which was trover against the sheriff, where the seizure and sale were both before the issuing of the commission, *Burrough* J., who spoke from very long experience, said the point was settled long before he knew *Westminster* Hall. I consider this case and *Potter* v. *Starkie* (*c*), and *Wyatt* v.

(*a*) 3 *Wils.* 304. 2 *W. Black.* 827.

(*b*) 5 *B. Moore*, 313.

(*c*) *Sel. N. P.* 1431. cited in 4 *M.* & *S.* 260.

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Blades (*a*), which two last cases were *Nisi Prius* decisions, and *Lee* v. *Lopes* (*b*), and *Price* v. *Helyar* (*c*), *Carlisle* v. *Garland* (*d*), which was on special verdict, and *Dillon* v. *Langley* (*e*), as constituting one continued series of decisions establishing the liability of the sheriff. These will be found to embrace a very considerable period of time, and to have been established, in succession, by all the common law courts in *Westminster* Hall, and the common practice, I believe, has been in uniform concurrence therewith. I cannot think that, against this accumulation of authority, the single case of *Bailey* v. *Bunning*, as reported in 1 *Levinz*, ought to prevail; and that, however strong particular notions may be as to what the law ought to be, we must be governed by what it has been during the whole time of living memory.

I am of opinion, therefore, that the judgment of the Court below as to *Jewison* should be reversed.

BOSANQUET J. The question in this case depends upon the effect which is to be given to a statutory provision, by which the property of a bankrupt which he had at the time of his bankruptcy is subjected to the operation of a commission against him.

The terms of the 6 *G.* 4., by which the bankrupt law is now regulated, do not materially differ from those of the statutes which preceded it; and being *in pari materiâ* with these, must receive a similar construction, there being no reason to suppose that any alteration regarding the point under consideration was intended to be made by the legislature. It is not to be disputed, with respect to persons in general, that after an assignment by the commissioners, all property of the

(*a*) 3 *Campb.* 396.
(*b*) 15 *East*, 239.
(*c*) 4 *Bingh.* 597.
(*d*) 7 *Bingh.* 298.
(*e*) 2 *B.* & *Ald.* 131.

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bankrupt is liable to be treated and dealt with, not merely as actually being, but as having been from the time of the act of bankruptcy the property of the assignees; and that persons who possess themselves of such property, or dispose of such property to others, are liable to be sued for a tortious conversion in actions of trover. This liability to answer in an action of tort to the assignees does not depend upon any actual or presumed knowledge on the part of the Defendant of the existence of an act of bankruptcy. The act of bankruptcy subjects the property of a trader to the right of his assignees in the event of a commission, and when the assignment has been executed, the title of the assignees is completed by relation from the date of the act of bankruptcy. The effect of this relation may sometimes produce hardship to individuals who may have purchased or disposed of property with perfect honesty and good faith. But the necessity of adopting a retrospective measure for the prevention of fraud has been thought sufficiently to counterbalance the evil of such occasional hardship. Even those persons who purchase goods sold by the sheriff under an execution against a trader, are liable to be sued in trover for the value of the goods by assignees claiming under a commission subsequently issued, if an act of bankruptcy appears to have been committed by the trader before the sale. A limit, however, has been set to this retrospective effect of the bankrupt law, by provisions introduced into the latter statutes, by which parties who act *bonâ fide* and without notice of an act of bankruptcy, are protected unless a commission shall have issued within a certain time.

Such being the general effect of the bankrupt law, the point now to be considered is, whether any exception to it is to be allowed in favour of the sheriff, who sells under the process of the law. No words importing

importing any express exception are to be found in any of the statutes; the exception therefore, if established, must be established by implication. The mere absence of notice is not a sufficient ground upon which an exception in favour of the sheriff can be founded. For in cases where a change of property has taken place without fraud, the sheriff, if he seize and sell the goods of the purchaser under an execution against the seller, will be liable in an action, though he may neither know nor have reason to suspect the change. In the case of bankruptcy, the act of bankruptcy, whether notorious or secret, is a fact which, coupled with the existence of a debt to a certain amount, renders the property of a trader liable to the operation of a commission. The right of a trader to his own property is a defeasible right: till the commission issues the property remains in the trader; but he holds it from the time of the act of bankruptcy, liable to be defeated by the proceedings under a commission, and subject to the rights which in the event of a commission the assignees may acquire to it. In the mean time this possibility of a right accruing to assignees under a commission affords no legal answer to a sheriff for not executing the writ directed to him: but if the sheriff has reason to apprehend a commission, he may ask for an indemnity, and in case a satisfactory one be not given, he may apply to the Court for time to return the writ, till it can be ascertained whether a commission is intended to be issued. Some risk, indeed, will be incurred by the sheriff, and if he is necessarily to be protected from all risk, an exception in his favour must be implied by law. But it is to be recollected that the office of sheriff is in its nature an office of risk. It is not for us to consider whether the policy of the law which has made it so, is or is not founded on wise principles. But so the law has made it; and so it must be treated

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in courts of justice. The sheriff is bound by statute to permit a defendant who is arrested to go at large upon bail; yet if bail, apparently or even actually responsible at the time, become insolvent before the return of the writ, the sheriff must render the defendant or pay the debt. This is a hardship upon the sheriff imposed by the operation of the statute *Hen.* 6. No difficulty, however, is found in obtaining persons willing to incur this responsibility; the office being an office of profit as well as of risk. If, therefore, the liability of the sheriff in the present case were now to be considered for the first time, I think that his title to an exemption from the general operation of the bankrupt law would be very far from clear. To me, however, it appears that the question ought not at the present day to be considered as open to discussion. The interpretation of the statute law, as well as of the common law, is to be sought for in the doctrines promulgated and acted upon in courts of justice. It may be admitted indeed that the express provisions of a statute cannot be overturned by the authority of a court; but upon the propriety of admitting an implied exception in the absence of express words, the authority of the Courts has the same weight as upon questions of common law: their decisions give the rule by which the profession is guided in advising parties upon their respective rights; and to question their correctness, after they have been recognised and acted upon for a long series of years, is not only to introduce uncertainty upon the point under immediate consideration, but to encourage resistance to established rules by holding out to ingenious persons a prospect of overturning them upon subtle and refined distinctions. If the judgment in *Cooper* v. *Chitty* be considered with reference to the facts of that case only, it will not amount to an authority upon the point now under discussion, since it appears that the sale by the sheriff took

place

place not only after the date of the commission, but after the assignment. But the authority of considered judgments is not to be confined to the point actually adjudged. The reasoning of Lord *Mansfield* in delivering the judgment of the Court, appears to take a wider range than the particular facts of the case required. He begins by saying that the bare defining the action of trover, and the grounds upon which the plaintiff is entitled to recover in it, will go a great way towards the understanding, and, consequently, towards the solution of the question in that particular case. In form, he says, it is a fiction, — in substance, a remedy to recover the value of personal chattels converted by another to his own use; that it lies in many cases where the defendant has got the possession lawfully; that two things are necessary to be proved, — property in the plaintiff, and a wrongful conversion by the defendant. After laying it down that dispositions by process of law are upon the same footing with dispositions by the party, and that to be vested they must be completed before the act of bankruptcy, he says, "Therefore, as to the first point, it is most clear that the property was in the plaintiff as and from the 4th of *December*, when the act of bankruptcy was committed; secondly, the only question then is, whether the defendant was guilty of a wrongful conversion. That the conversion itself was wrongful is manifest. The sheriff had no authority to sell the goods of the plaintiff, but of *John*'s only." Here the right to the property disposed of is made the test of the wrongful conversion. His Lordship then proceeds to consider whether the defendant was excusable though the act of conversion was wrongful. As to which, he says, "Though the statutes rescind contracts and executions not complete before the act of bankruptcy, they do not make men *trespassers* or *criminal* by relation. But the injury complained of (that is, in the action of trover,)

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trover,) is the wrongful conversion. The sheriff acts at his peril, and is answerable for all mistakes. None of the cases authorize the sheriff to sell the goods of a third person." Here the distinction between trespass and trover appears to be distinctly taken. The injury complained of in trespass is the unlawful force; in trover the wrongful conversion of property. The mere act of force is *excused* if committed before an assignment in fact; but if a conversion takes place, the person to whom the law ascribes the property is entitled to a compensation for his loss from the person, whoever he may be, that has converted his property.

It had been determined in the case of *Bailey* v. *Bunning* (*a*), that a sheriff who had taken goods in execution after an act of bankruptcy, was not liable to the assignees in an action of trover.

The dates of, and the special finding of the jury, as they all appear upon the special verdict, have been already stated.

It is very material to observe, that in this case there was no sale; nothing was done with respect to the goods beyond the first taking possession under the writ, by the officer in whose hands they still remained when the action was brought; and the sole question referred to the Court by the jury was, whether this *taking* was lawful. Unless this taking amounted to a conversion, the Defendant was entitled to a verdict; for the demand and refusal stated in the special verdict, though evidence of a conversion, could not be taken to amount to an actual conversion; a point which had been settled long before the case in question, having been laid down as clear in 10 *Rep.* 56, 57., the case of *The Chancellor of Oxford.* According to the report in *Levinz*, *Wyndham* said, that notwithstanding the suing of the

(*a*) 16 *Car.* 2. reported in 1 *Lev.* 173. 1 *Sid.* 272. 2 *Keb.* 32.

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writ the goods are subject to the disposal of the commissioners: but he, *Twysden* and *Kelynge*, all agreed that the issue was found for the defendant; for the *taking* by him was lawful by virtue of the writ. *Siderfin* says the Court delivered this opinion that the goods were liable from the *time of the teste* of the *fi. fa.*; and this shall be said to be *emanatio brevis*, although it was in fact at another time. And as to the other point they were clearly of opinion that the bailiff was not liable in trover, for that the sheriff (*as the case is found*) *took* the goods lawfully. According to *Keble*, *Kelynge* C. J. said the special conclusion being on the *taking*, the officer is not *punishable*. The case of *Bayley* v. *Bunning* therefore, is not an authority for the sheriff where there has been an actual sale: and so Lord *Mansfield* appears clearly to have thought. And with respect even to the original taking, the case of *Bayley* v. *Bunning* is distinguishable from executions of a later date. For though the writ of *fi. fa.* had been delivered to the sheriff after an act of bankruptcy, it was tested before. And having been issued in a case which occurred before the statute 29 *Car.* 2. *c.* 3., it did there bind the goods from the teste. Upon which point much reliance was placed. Accordingly, Lord *Mansfield* observes, in the case of *Bayley* v. *Bunning* the goods were clearly bound by the teste: and then adds, "the question referred by the special verdict was upon the *taking*, viz. whether the party was guilty in the taking; and the Court *excuse* the bailiff for his innocent executing of the writ." The act of taking seems to have been treated as an act of excusable trespass, either on account of the teste, or the character of the officer; and independently of the taking there was no conversion. It is remarkable that *Siderfin*, after stating the argument for the bailiff, that he ought not to be found guilty because he had only performed his duty, and had not converted the goods to his own

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use, adds, "*Quære*, for it was affirmed that the practice is, that the bailiff shall be found guilty if the party was thena bankrupt."

It is said in Lord *Raymond's Rep.* 724., to have been ruled by Lord *Holt* C. J. at *N. P.* 10 *Will.* 3., if, after a bankruptcy, the sheriff upon a writ of *fi. fa.* against *A.* seizes the goods and *sells them*, and a commission of bankruptcy is granted and the goods assigned by the commissioners, the assignee of the commission may maintain trover against the vendee of the goods, but no action will lie against the sheriff because he obeyed the writ. The latter part of this proposition is the very point now contended for, to which it appears from his remarks on Lord *Raymond's* notes, that Lord *Mansfield* did not assent. He says the notes were taken when Lord *Raymond* was young, as short notes for his own use; and are too incorrect and inaccurate to be relied on as authorities: that it might not be at all material to attend to the distinction between trespass and trover; that the passage in question was a loose note of what was said *obiter*, and manifestly refers to the case of *Bayley* v. *Bunning*; but is no authority in the present case. It must be admitted, however, that Lord *Mansfield* in several parts of his judgment notices and avails himself of the sale in *Cooper* v. *Chitty* being subsequent to the commission and assignment. Thus, in commenting upon *Cole* v. *Davies*, he says, "Besides the case there put is of a sale by the sheriff *before the commission, and the conversion* might be as excusable as the taking, because he obeyed the writ; whereas here the goods were not sold till after *both commission and assignment.*" Again, "The taking (in *Cooper* v. *Chitty*) was innocent, and in that sense lawful, but as a ground to support a conversion by a sale after a commission publicly taken out, and an actual assignment made, it was not lawful." And at the

the conclusion, "The gist of this action is the wrongful conversion by the sale and false return long *after* the commission and assignment." A question might, therefore, fairly be raised, whether the proposition ascribed to Lord *Holt* was intended to be denied by Lord *Mansfield*, or only to be distinguished from the case in judgment. It is scarcely possible that such a point should be long suffered to remain in doubt, since it must have been of frequent occurrence: and if the general reasoning of Lord *Mansfield*, and his particular observation respecting Lord *Raymond*'s note, have, from the year 1756, been treated in practice and in judgment as contradictory to the point therein stated, the point ought to be considered as over-ruled. Two passages apparently inconsistent with each other have been cited on the authority of Sir *W. Blackstone*. In his report of *Cooper* v. *Chitty* he states Lord *Mansfield* to have said, "But had the sale been immediately after the seizure, still the sheriff would have been liable." And in his report of *Timbrel* v. *Mills*, that "the whole Court declared that it was allowed in that case (*Cooper* v. *Chitty*), that if the sheriff levies the money and pays it to the plaintiff before any commission issued, and without notice of the act of bankruptcy, he will, at all events, be safe." It is not likely that both these passages should have been uttered by Lord *Mansfield* upon the same occasion. And as no notice is taken of either of them either in the report of Sir *James Burrow* or in that of Lord *Kenyon*, little reliance can be placed upon them.

No question appears to have been raised respecting the effect of the judgment in *Cooper* v. *Chitty* till the year 1807, in the case of *Potter* v. *Starkie*. But in the mean time we find the principle supposed to be established, stated in practical books, and assumed in courts of justice. In the editions of *Cook's Bankrupt Law*, published many years before the case of *Potter* v. *Starkie*,

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kie, it is said, "The sheriff who executes a *fi. fa.* upon the bankrupt's goods, after an act of bankruptcy committed, and before the issuing of a commission, is not a trespasser, but the assignees may maintain trover against him. In *Gwillim's Edition of Bacon's Abridgment*, published in 1798, tit. *Bankrupt*, it is said, "It seemeth to have been formerly very much doubted whether the assignees could maintain any action against an officer who had the goods of a bankrupt in execution after an act of bankruptcy, and before the issuing a commission; but it is now *settled* that the assignees may, in such case, bring trover against him, though the relation shall not operate to make him a trespasser."

The distinction with respect to the liability of the sheriff in trover, though exempt from an action of trespass, had been expressly recognised in 1786 in *Smith* v. *Milles* (*a*) as established by *Cooper* v. *Chitty*. In *Hitchin* v. *Campbell* (*b*), — *Trinity* term 12 G. 3., only sixteen years after *Cooper* v. *Chitty*, — which was an action of *indebitatus assumpsit* against an execution creditor for the amount of debt levied after the act of bankruptcy but before the commission, Lord C. J. *De Grey*, in delivering the opinion of the Judges, (of whom Sir *W. Blackstone*, who reports the case, was one), says, "That the legal effect of an act of bankruptcy committed by a trader, is to put it in the power of the commissioners, by relation, to divest the property of the bankrupt from that time, in case a commission is afterwards issued. This relation takes place in every instance but those excepted by the statute 1 *Jac.* 1., 21 *Jac.* 1., and 19 *G.* 2. Executions are not among those excepted cases, but are expressly declared void by the statute 21 *Jac.* 1. Yet, notwithstanding this transfer of the property by relation, the sheriff is certainly no *trespasser* by taking the goods in execution after the act of bankruptcy and *before* the

(*a*) 1 *T. R.* 475. (*b*) 2 *Black.* 829.

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commission issued. So ruled in *Letchmere* v. *Thorowgood* (*a*) and in *Cooper* v. *Chitty*. (*b*) But by *selling* the sheriff *converts* the goods, and then trover is maintainable against the sheriff or his vendee, or the plaintiff in the original action." A former action had been brought in *trover* against the sheriff and the defendant, in which there was a verdict and judgment for the defendant. As to which action the Chief Justice observed, "As there was clearly a *conversion* before the action of trover, the only question could be on the *property*;" thereby intimating, that if the goods belonged to the bankrupt there could be no defence. And according to the report of the same case in *Wilson* (*c*) the Court say, "That the action brought in trover against the sheriff of *Surrey* and the defendant, to recover the value taken in execution, *well lay*." In the year 1792 *Grose* J., in the case of *Farr* v. *Newman* (*d*), after adverting to the difficulty on the part of the sheriff of distinguishing between the goods of an executor and the goods of a testator, says, "If this would be a sufficient answer in the mouth of the sheriff, what are we to say to cases of a much severer line of justice; cases where a sheriff is considered as a *tort feaser by relation*; cases of bankruptcy?" In the case of *Menham* v. *Edmonson* (*e*) the act of bankruptcy took place in *December* 1796, the execution on the 30th of *March* 1797, and the commission issued in the *June* following. The execution creditor having accompanied the sheriff's officer at the time of the execution, he was sued by the assignee in trover; and it being objected that the action should have been brought against the *sheriff*, in whose hands the money remained, it was not contended that the action might not have been maintained against him.

(*a*) 1 *Comb.* 123. and 1 *Show.* 12.

(*b*) *Burr.* 20.

(*c*) 3 *Wils.* 308.

(*d*) 4 *T. R.* 633.

(*e*) 1 *B. & P.* 367.

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Eyre C. J., after stating that he had some doubt at first whether the action should not have been brought for the money as the execution had been regularly made under the authority of the law, and the goods regularly sold, observed, "There is a fact, however, in this case, which decides the point, viz. that the defendant was in company with the sheriff's officer at the time of the execution. By the case cited, *Rush* v. *Baker* (*a*), it appears that trover may be maintained against the party himself if he give bond to the sheriff, because that is equal to intermeddling; actual intermeddling therefore must be equal to giving a bond." Here, the liability of the sheriff himself seems to have been assumed, and the participation of the Defendant in his act, is stated as the ground of his liablity. In the year 1807, the point now in question was distinctly made before Mr. Baron *Wood* in *Potter* v. *Starkie*, and that Judge, whose practical experience as well as learning are well known, held the sheriff liable; in which he was confirmed by the court of exchequer. Eight years after this, the case of *Wyatt* v. *Blades* (*b*) occurred before Lord *Ellenborough*, in which the act of bankruptcy having taken place on the 8th of *December*, the goods were seized and carried to a broker on the 8th of *February*, and the commission issued on the 12th of the same month; and Lord *Ellenborough* held in trover against the sheriff, that the removal was a sufficient conversion to support the action, though the goods were never sold, but remained at the brokers, in consequence of a notice not to sell: and though no demand of the goods had been made, no objection was made to the liability of the sheriff to answer for the conversion. In eight years more, in the year 1821, the point was again raised in *Lazarus* v. *Waithman* (*c*) in the time of Lord

(*a*) 2 *Str.* 996.
(*b*) 3 *Campb.* 396.
(*c*) 5 *B. M.* 313.

Chief

Chief Justice *Dallas*, when the Court of Common Pleas, after an argument in which *Bayley* v. *Bunning* and the old cases were cited, decided against the sheriff. Mr. Justice *Burrough* saying that the point was settled long before he knew *Westminster Hall*. Again, in 1828, in *Price* v. *Helyar* (*a*), in the time of Lord Chief Justice *Best*, the same Court came to a similar determination. And the judgment of that Court, in *Carlisle* v. *Garland* (*b*) in 1831, in the time of the present Lord Chief Justice, was conformable to the former decisions. Finally, in the same year, 1831, the Court of King's Bench, in *Dillon* v. *Langley* (*c*), also decided in the same manner against the sheriff. Upon that occasion the noble and learned Lord, whose loss we so recently had occasion to deplore, (Lord *Tenterden*) expressed the opinion of the Court in the terms which I desire to adopt, and with which I shall now conclude, "He (the sheriff) must obey the writ, but he is also required to know whose goods he takes. I think, in this case, we ought to say that we consider ourselves bound by the many decisions which have taken place establishing the liability of the sheriff." I am therefore of opinion, that the judgment of the Court of Exchequer for the Defendant *Jemison* ought to be reversed.

GASELEE J. Upon the best consideration I have been able to give to this case, I am of opinion that the judgment of the Court of Exchequer ought to be affirmed; and, although I am sorry to have the misfortune of differing from those of my learned brethren who have preceded me, and also of those who are to succeed me upon this occasion, it is a matter of great consolation to me, that I am supported by the unanimous opinion of the Court of Exchequer. The reasons upon which that judgment is founded are so fully, and to me, so satis-

(*a*) 4 *Bingh.* 597.
(*b*) 7 *Bingh.* 298.
(*c*) 2 *B.* & *Adol.* 131.

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factorily stated by the Lord Chief Baron in the reports of the case in 2 *Crompton and Jarvis*, page 20. and in 1 *Tyrwhitt*, 17., that I should consider myself guilty of an unnecessary waste of time, were I to repeat them from the reports; and I should run a considerable risk of weakening their impression, were I to attempt to state them in any other terms.

There is certainly great weight in the argument, that the decisions in *Cooper* v. *Chitty*, and many subsequent cases, are contradictory to that of the Court of Exchequer; and if they had corresponded with the older cases, so that there had been a constant course of decision in the same way, I should have very much hesitated before I should have ventured to break in upon them; and it is to that consideration that I attribute my having concurred in the judgment given by the Court of Common Pleas in the case of *Price* v. *Helyar*, having always considered that if the case were a new one, the sheriff was undoubtedly entitled to protection. Independent, however, of the circumstance, that in the case of *Cooper* v. *Chitty*, and many of the subsequent cases, the acts of the sheriff, after he had notice of the bankruptcy, were sufficient to support the decision of those cases, it appears to me that the earlier cases are authorities in favour of the sheriff, and, therefore, that in affirming the judgment of the Court of Exchequer on this occasion, we should not be overturning the constant course of the authorities upon the subject, but restoring the law as it was laid down and acted upon in the reign of *Charles* II., and from thence downwards to the time of the decision in *Cooper* v. *Chitty*.

Upon considering the several reports of the case of *Bayley* v. *Bunning*, it is not quite clear that the allegation in the judgment of the Court of Exchequer, — that in deciding the case of *Bayley* v. *Bunning* the Court by disallowing the objection that the goods were to be considered as bound by the teste of the writ of execution, which

which was before the act of bankruptcy, allowed the other objection, viz. that the taking was lawful in respect of the character of the person by whom it was made, — is quite accurate; for, although the latter was clearly one of the grounds of the decision, it is not so clear that it was the only one. The report in *Levinz*, concludes thus: "And afterwards, *Easter* 18th, judgment was given for the Defendant; he being an officer obliged to execute the writ, who could not be aware of any acts of bankruptcy, or know that any of them would be acted upon." And the report in *Siderfin* states the Court as to the other point, viz. the character of the sheriff, were clear that the bailiff is not guilty of trover; for that the sheriff took the goods lawfully.

During the argument of this case in the Court of Error, a doubt was thrown out whether the case of *Bayley* v. *Bunning* was an action of trover; and it was suggested, that it might be an action of trespass, and so reconcile all the cases. The original roll has, therefore, been inspected, and it thereby clearly appears that the form of action was trover.

LITTLEDALE J. It is admitted on all hands that, — as far as relates to the judgment-creditor if he interferes in the sale or receives the produce after the sale, and also the vendee of the sheriff or other officer, — the goods of the bankrupt are, upon the assignment to the assignees, vested in them by relation to the act of bankruptcy, so as to avoid all mesne acts and dispositions; and that, both upon the words of the various acts of parliament, and the uniform construction that has been put upon those acts, and the policy of the bankrupt laws. And therefore I do not think it necessary to advert to any authorities as to the ground or effect of relations either at common law or by any acts of parliament.

The words of the act of parliament relating to bankrupts

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factori… and make no exceptions as to the port… only indeed that as the King is an… them, they do not affect the crown till g… assignment of the property.

It is contended on the behalf of the Defendant, that he is to be exempted from liability for seizing and selling if he has no notice of an act of bankruptcy. And he contends this upon two grounds: first, that the older statutes of 33 & 34 *Hen.* 8. *c.* 4., 13 *Eliz. c.* 7., 1 *Jac.* 1. *c.* 15., 19 *Jac.* 1. *c.* 19., and 5 *G.* 2. *c.* 30. do not extend to the sheriff at all, and that the last statute of 6 *G.* 4. does not increase the liability of the sheriff.

The statute of *Hen.* 8. says, the sale by the commissioners shall be good and effectual against the bankrupts, their heirs and executors, as though the sale had been made by the bankrupt at his own free will and liberty.

13 *Eliz. c.* 7. *s.* 2. says the sale by the commissioners shall be good and effectual (after an enumeration of various descriptions of persons) "against all other persons claiming by, from, or under the bankrupt by any act had, made, or done after he shall become bankrupt."

The other acts of the 1 *Jac.* 1., 19 *Jac.* 1., and 5 *G.* 2., as to the sale or assignment by the commissioners, all refer to the stat. of *Eliz.*, and no fresh powers are given to the commissioners, except that the twenty-sixth section of the 5 *G.* 2. directs the commissioners to assign to assignees for the general benefit of creditors who prove their debt.

But I think that the words of the statute of *Elizabeth* are sufficient to bind the sheriff; for though he does not claim, as to any beneficial interest, from the bankrupt, yet he claims to sell, for the purpose of paying over the proceeds to the creditors of the bankrupt, and the person to whom he sells certainly claims under the bankrupt; and it would be somewhat extraordinary if

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.ne sheriff, who sells under such circumstances, was to be excepted out of the operation of the statute.

I may observe, that I am not aware that this point has ever been raised before, which, if there had been any ground for it, would surely have been done, considering the great variety of cases in which this subject has been agitated for the last 70 years.

The statute of 6 *G.* 4. *c.* 16. is differently expressed from the former acts: in the twelfth section it says the commissioners are to assign in manner after directed; and then the manner is directed in the sixty-third section, which contains no such words as are contended to be a limitation of the persons bound.

But I do not consider whether this enlarges the power of the commissioners or not, because I think the former acts extend to sheriffs and other similar public officers.

But it is said the law will make an implied exception in favour of the sheriff or other person having the execution of process, because he is bound to obey the king's writ, and it would be very hard to make him liable to an action when he acts according to the best of his judgment, and has no means of ascertaining whether the debtor has, or has not, committed an act of bankruptcy.

With regard to his being a public officer, and that he is bound to obey the king's writ, there is no doubt but he is, and in the execution of that duty he ought to be protected.

But the question is, does he act in obedience to the king's writ? That commands him to take the goods of *A.*; but how can they be said to be the goods of *A.* when *A.* himself has lost his power of conferring any property, and when the judgment-creditor has no right to have them as the goods of *A.*, and when the person to whom the sheriff will sell has no such right?

And the result, therefore, is, that instead of seizing the

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the goods of *A.* he seizes the goods which, by relation, have become the goods of the assignees.

But it may be said they *are* the goods of *A.*; that he has acquired them; that he is in possession; treats them as his own, and no other person has yet acquired a right to them.

But by the act of bankruptcy there is a sort of stamp or mark fixed upon them, which, though invisible at first, afterwards is brought into light by the commission, and attaches upon them so as to destroy all property in the bankrupt, which destruction of property, though not apparent at the time of the levy, afterwards, when the commission and assignment take place, operates in the same way as if the whole had been known at first.

He takes upon himself to sell goods which the judgment-creditor has no right to have sold, and which the person who buys from the sheriff has no right to buy.

How can this be acting in obedience to the king's writ?

As to the hardship upon the sheriff, the general policy of the bankrupt laws makes many things apparently hard.

It is very hard that if a man who owes a trader money pays it to him *bonâ fide* in the regular course of business, without any suspicion of an act of bankruptcy; or if a bankrupt owes money which he pays to a creditor in the ordinary course of business, he having no suspicion that an act of bankruptcy has been committed; or if a trader sells his estate after having committed a secret act of bankruptcy; that all these transactions should be rendered invalid by the general operations of the bankrupt laws: yet it is so; and it is only by several particular acts of parliament, applicable to these various cases, that the various hardships which I have enumerated are corrected or modified.

It is a hardship on a sheriff if he seizes goods of which the debtor is in possession and apparent ownership, and it should turn out that the possession and apparent ownership was not fraudulent, that the sheriff should

should be liable; and yet the circumstances may be such as that the sheriff has no means of ascertaining the ownership.

I think the hardship of a case ought not to form a principle on which the law should act. Society is so formed that many persons fill relations which appear to induce great hardships. If these hardships be of sufficient importance for the legislature to interfere they will do so.

If cases of hardship be brought before the Court they will frequently interfere so as to relieve the sheriff, if the law will permit it. And a late act of parliament, often called the Interpleader Act, in some degree acts as a relief to the sheriff: but that has nothing to do with the general liability of the sheriff.

But then the Defendant says, that by the constructions which have been put upon the statutes by the general administration of the bankrupt law, public officers who have to execute process are protected in cases like the present; and that, though for a number of years back there are cases, and the practice while these cases have been in force has been against sheriffs, yet these recent cases and practice are not according to law, and that the earlier cases are contrary, and that they being the first that occurred after the bankrupt law was introduced, are to be regarded as the real existing law, not to be overturned by late decisions; and more particularly the Defendant says that the whole of these modern cases and modern practice have been founded on a misapprehension of the case of *Cooper* v. *Chitty* (*a*), and that in all the later cases the former decisions have not been sufficiently brought before the Court.

The earliest case urged on the behalf of the Defendant is *Bailey* v. *Bunning* (*b*), and the Judges there say

(*a*) 1 *Burr.* 20. 1 *Black.* 65. (*b*) 1 *Lev.* 173. 1 *Sid.* 271. 1 *Keny.* 395.

that

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that the sheriff's taking was lawful by virtue of the writ.

But in *Siderfin* the reporter makes a query; for it is affirmed that the practice is, that the sheriff shall be found guilty if the party was then a bankrupt.

The special verdict has been examined in *Bailey* v. *Bunning*, and it appears that the sheriff had caused to be made the debt of the goods, chattels, and monies of the bankrupt, but that they remained in his hands, and he had not sold or delivered them to the judgment-creditor, and then it states a demand and refusal, and concludes with saying that they are ignorant whether the *taking* was lawful.

This special verdict is quite imperfect: there is no conversion found, and the question by the jury is, whether the *taking* was lawful, and, therefore, in such an imperfect case, the very slight way in which it is mentioned in the two reports makes the decision amount to very little; especially as one reporter states the practice to be contrary; and that may account for the language of the Judges that the taking was lawful; which may have been meant to apply to the original taking only, and not to say whether, if the goods had been sold, the sheriff would be liable.

This case, however, as far as it goes, is confirmed by what the Court says in *Phillips* v. *Thompson*. (*a*)

Turner v. *Felgate* was mentioned in *Bailey* v. *Bunning*, it is reported in 1 *Lev.* 65. 2 *Sid.* 125., and it has been considered as applicable to the present case.

That was an action of trespass against the creditor who had obtained judgment, and levied under a *fieri facias*, and the judgment was afterwards set aside by rule of Court. And it was there said that the sheriff was not liable, because he acted in obedience to the

(*a*) 3 *Lev.* 191.

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king's writ, and that there is a difference between the party and the sheriff in that respect.

There is not the least doubt about that. The sheriff is protected by the writ, and he need only plead that, by way of justification to an action of trespass. But the party must plead the judgment. The sheriff is bound to obey the writ; but the party must shew that he had authority to sue out the writ, and that authority is the judgment. If the party was not bound to shew the judgment it would be in the power of any man, who had obtained no judgment, to sue out any sort of writ of execution for any amount that he thought proper.

But that does not apply to the present case; here the writ directs the sheriff to take the goods of *A.*, and if he does take the goods of *A.* it is immaterial to him whether there was any judgment against *A.* or not.

But the complaint is, that he does not obey the king's writ, and that being directed to take the goods of *A.*, he takes goods which, though in the possession of *A.*, yet by operation of the bankrupt law ultimately turn out, in point of law, not to be the goods of *A.*

The case of *Lechmere* v. *Thoroughgood* (*a*) is also cited in favour of the Defendant. That was an action of trespass against the sheriff. One of the points in dispute was, whether the crown under an extent, or the party under a *fieri facias* was entitled to the goods.

But the Court said the sheriffs were not liable in this action; and there is no doubt but that according to the modern cases he is not liable in trespass; for in *Smith* v. *Milles* (*b*) it was held that an action of trespass will not lie against the sheriff who seizes goods after an act of bankruptcy, and before the issuing of a commission, even though he afterwards sells them. But, at the same

(*a*) 3 *Mod.* 326. 1 *Show.* 12. *Comb.* 123.

(*b*) 1 *T. R.* 475.

time,

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time, I must observe, that in the report of the case, *Lechmere* v. *Thorowgood*, in 3 *Mod.* there is nothing said about the liability of the sheriff. Afterwards an action of trover was brought against *Toplady*, the party, and *Thorowgood*, and another, for taking the goods, and it is reported in 1 *Shower*, 146. and 2 *Ventris*, 169.; and they pleaded the judgment in the former action, and it was held to be a bar.

But that was decided only on the technical ground of law, that after a judgment for the defendants in trespass, the plaintiffs could not recover in an action of trover for a conversion of the same goods: but there is not a syllable said in the latter case as to the liability of the sheriff; and I think no argument can be applied from any reasoning upon technicalities and the form of action, as to whether the sheriff is liable for seizing and selling goods under circumstances like the present.

Coles v. *Davies* (*a*) is also cited for the Defendant. Lord Chief Justice *Holt* there held that the sheriff was not liable to an action of trover under circumstances like the present. That case, as far as it goes, is in point for the Defendant, but it is only a *Nisi Prius* decision.

As to the other cases of *Bailey* v. *Bunning*, and *Lechmere* v. *Thorowgood*, considering the imperfect manner in which they are reported, and considering also the special verdict in *Bailey* v. *Bunning*, I think they only amount to a declaration of the opinions of the Judges there, that, generally speaking, the sheriff was not liable; but by no means to a judgment upon a case like the present, distinctly brought and argued before them. And that therefore the courts in late times are not so far bound by those cases but that they may take another view of the point, without being considered as unwarrantably overturning former decisions.

(*a*) 1 *Ld. Raym.* 724.

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The case of *Cooper* v. *Chitty* is the leading case on the subject in modern times.

I admit that the facts of that case are not the same as here, — for there the sale was after notice of the act of bankruptcy, and after the commission and assignment, — and that the decision could not of itself be sufficient to authorize the Court to give judgment for the Plaintiff.

That case has been followed by a variety of other cases, in some of which at least the facts were the same as the present.

I do not think it at all necessary to go through these cases, and comment upon them, and upon the language used by particular Judges, as that has been so fully done already. The result of these cases fully satisfies my mind, that in the present case the bailiff is liable, and I may say in addition, that I have known a great many cases tried at *Nisi Prius*, in which the point has never been doubted.

And I would also add in conclusion, that if the cases of *Bayley* v. *Bunning*, and *Lechmere* v. *Thorowgood*, had been fully brought before the Court upon a case like the present, and the judgment given according to the opinion there expressed by the Judges, yet, if I had found that for a series of years there had been so many decisions and constant practice the other way, then, inasmuch as the later authorities are according to what would be my opinion, if the question was now for the first time to come under consideration, I should say, that the Court ought to act upon the late authorities, though by that means the former decisions should be overturned.

I have not given any opinion as to the effect of the respective indemnities to *Jewison* and to *Ingham*, as I am of opinion that they are both liable to this action, independent of any question of indemnity.

Upon the whole of the case, I am of opinion, that

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the judgment of the Court of Exchequer ought to be reversed.

PARK J. This case has been so fully discussed by my learned Brothers who have preceded me, that I am much tempted merely to express my concurrence with the majority. The only reason why I prefer the contrary course is, that I may not be supposed to have taken no pains to instruct myself in a matter where the Court of Exchequer has delivered a unanimous judgment, supported, as that judgment is, by my learned Brother sitting next me, and which judgment the majority of the Judges now present think ought to be reversed.

The real point in this case is, whether a sheriff or bailiff of a liberty who seizes the goods of a man under a writ of *fieri facias*, a secret act of bankruptcy having been previously committed, and of which the sheriff had no notice, is liable in an action of trover to the assignees of such man under a commission of bankruptcy subsequently issued, founded upon the said previous act of bankruptcy. I am of opinion that he is.

It may certainly be hard on a sheriff or bailiff that he should be held liable in a case like the present, where no misconduct can be imputed to him or to his officers; but it appears to me that if on account of such hardship we were to affirm this judgment of the Court of Exchequer, we should break in upon an established rule of law, established confessedly for above seventy years; admitted as a clear rule in all the text books of writers upon bankrupt law; acted upon by all practisers in their advice to clients, and confirmed by some of the ablest men that have ever adorned the judicial seat from Lord *Mansfield* down to the present day; namely, from the year 1756.

The question really is, whether these goods, when the bailiff seized them, were the goods of the bankrupt,

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rupt, or the goods of the assignees by relation to the act of bankruptcy. That the act of bankruptcy vests the goods in the assignees seems not to be disputed: then certainly the process having commanded that the goods of *A.* should be taken, the sheriff must at his peril answer, if he take goods which have become the property of *B.*, by being sued in an action of trover. Mistake as to the right of property at the time of the seizure both in the Plaintiff herself, and in the sheriff, as was truly stated by my Brother *Bayley* in the case I am about to quote, will not excuse the sheriff. And indeed that was a very hard case: I mean the case of *Glasspoole* v. *Young* (*a*), where a writ of execution issued against a man named *Meering*, the supposed husband of the plaintiff, who really believed herself to be his lawful wife at the time of the seizure of the goods, which had been her property; but after this, the woman discovering that a former wife was living, and the marriage with her consequently void, recovered the value of the goods against the sheriff in an action of trover, by the unanimous judgment of Lord *Tenterden*, and my Brothers *Bayley*, *Littledale*, and *James Parke*. The rule of law, then, is undoubted, that the sheriff must at his peril seize the goods of the party against whom the writ issued; and if they have ceased, without fraud, to be the goods of that party, the sheriff is liable if he seized them, though not cognizant of the change of property. The hardship, then, can be no argument if the law be clear, for there are many, many cases in which the law has thrown a similar liability on the sheriff, not regarding the hardship; and I am not aware of any exception in any bankrupt acts in favour of the sheriff. For as Lord *Ellenborough* said, in the case of *Stevens* v. *Elwall* (*b*), "the Court must be governed

(*a*) 9 *B.* & *C.* 696. (*b*) 4 *M.* & *S.* 529.

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by the principles of law, and not by the hardship of any particular case; for what can be more hard than the common case of trespass, where a servant has done some act in assertion of his master's right, that he shall be liable not only jointly with his master, but if his master cannot satisfy it, for every penny of the whole damage, and his person also shall be liable for it?" But the sheriff is in a much better situation, for though he must often act at his peril, and sustain losses, yet he has considerable fees in poundage, &c. to remunerate him.

It is admitted, indeed it was impossible to deny, that the point has been expressly decided over and over again; but it is desired that all those cases should be overturned because they all, it is said, depend upon the case of *Cooper* v. *Chitty*, and none of the latter cases refer to the cases before *Cooper* v. *Chitty*, and which are at variance with that decision: for those who wish to overturn, allege, that if the Courts had looked at those prior decisions, they never would have upheld Lord *Mansfield*'s doctrine, and that of his brethren. This seems to me to be a most disingenuous argument, and not very complimentary to the Judges who, numerous and powerful in knowledge and talent as many of them have been, have decided those latter cases. It is true that in the arguments of some of them the older cases of *Bailey* v. *Bunning*, *Letchmere* v. *Thorowgood*, and others, have not been mentioned; but are we thence to infer that the learned Judges were unacquainted with or did not weigh those decisions? The fact is directly otherwise; and the fair and legitimate inference is the reverse. The later Judges, it is said, have followed *Cooper* v. *Chitty*. Be it so; then they must have read it, and they could not do so without seeing the cases I have alluded to, reasoned and commented upon both at the bar and on the bench; and therefore the fair and legitimate inference is, that the Judges were of opinion

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that *Cooper* v. *Chitty*, if it did not overturn the former decisions, was more consonant to reason, public convenience, and sound policy, in holding the sheriff liable even in the case of mistake and ignorance: and it is to suppose that the Judges shut their eyes, and remained wilfully ignorant of the prior cases: besides, it is a mistake in the judgment of the Court of Exchequer, when they allege that none of the cases later than *Cooper* v. *Chitty* refer to *Bailey* v. *Bunning*; for the contrary is the fact. I have considered the cases alluded to; and although I do not highly approve of very long and elaborate judgments, yet I must say that in all the Reports of the different stages of the case of *Letchmere* v. *Thorowgood*, and *Letchmere* v. *Toplady*, it is most difficult to get at the real history of that case; but, taking them altogether, one thing seems clear, that the sheriff was held not to be a trespasser in such a case as this; and no Judge in *Cooper* v. *Chitty*, nor in any case since, has so considered him. It was also held in *Letchmere* v. *Toplady*, where trover was afterwards brought, that it would not then lie, not that it would not lie generally speaking, but that the plea of a judgment in the case of trespass against the sheriff was a good bar by way of estoppel. Whether the Court was right or wrong in this latter opinion I do not stop to enquire: if wrong, it weakens the authority of the case altogether; if right, it does not militate against the position that trover generally will lie, though trespass will not, against the sheriff. In *Comberbach*, 123. he makes Lord Chief Justice *Holt* say, that the property of the goods is vested by the delivery of the writ of *fieri facias* even against the king's extent. This Lord *Mansfield* truly says he could not have said, for no *inception* of an execution can bar the crown. Lord *Holt* himself in another case, says the direct contrary to what *Comberbach here*

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reports of him; for in *Smallcomb* v. *Cross* (*a*) his Lordship says, "The property of the goods is not absolutely bound by the delivery of the writ to the sheriff." And this question is now happily set at rest by the decision of the House of Lords last session in *Giles* v. *Grover*. Besides, it is difficult to understand when, and by whom this case was decided. 3d *Modern* decided this case in *Trinity*, 4th *James* II., at which time Sir *John Holt* was not Chief Justice: for it is clear matter of history, that he was appointed upon the Revolution in the room of Sir *Richard Wright*, who continued all the *Michaelmas* term following the landing of King *William* to be Chief Justice; and no *Hilary* term was kept in consequence of the Revolution. *Comberbach* makes the decision take place in *Trinity*, first of King *William*, twelve months after the date of the former; and *Shower* states the decision to have taken place in *Easter*, first of King *William*. The case of *Letchmere* v. *Toplady* was in the Common Pleas, *Hilary*, second of *William* and *Mary*. My only object, in making these observations, is to shew the extreme inaccuracy and inattention of those persons, who, by this inaccuracy in dates, may be presumed to have taken their accounts of what passed from others, but not to have been themselves present; for even the publisher of 3d *Modern*, says in his Preface, that he must confess that some of the late reports (of course not meaning his own) are collected with very little judgment. *Bayley* v. *Bunning* (*b*), which is also mentioned in *Phillips* v. *Thompson* (*c*), was undoubtedly an action of trover; but for the reasons so ably given by my brother *Bosanquet*, and which I therefore shall not repeat, it is clear that, even giving full credit to the decision it does not at all govern this case: *Siderfin* does not

(*a*) 1 *Ld. Raym.* 251.
(*b*) 1 *Lev.* 173.
(*c*) 3 *Lev.* 191.

agree:

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agree: but even if it were more applicable to this case, I cannot feel all that respect for such unsatisfactory accounts of that decision, so at least as to induce me to agree to overturn the uniform and consistent train of judgments of seventy-six years and more by some of the ablest Judges that *Westminster Hall* has seen.

The oldest man now living remembers no other rule upon this point, than that which it is supposed *Cooper* v. *Chitty* established: and admitting, for argument only, that that was a novel decision, yet no inconvenience has resulted from it: Judges have been followers of it, counsel and attornies have advised on its strength, and merchants have, as assignees, known and abided by the rule: and it is, as we well know, frequently immaterial how points of law are determined, provided they are known and uniform; and, certainly, this point of law has been known and uniform for the long period I have mentioned. I was, therefore, surprised to observe in one of the arguments of this case in the court below, a statement, that there had been some recent decisions on this subject. Who were the Judges that decided *Cooper* v. *Chitty?* Lord *Mansfield*, who is not, I believe, remembered by any one present, myself excepted: but he was a Judge who, in the expressive language of one who knew him well, and who could duly appreciate his learning and ability, so enlarged and commented upon cases, and was so powerful in argument, that his hearers were sometimes lost in admiration, at the strength and extent of the human understanding. His colleagues, when *Cooper* v. *Chitty* was decided, were no other than Sir *John Eardley Wilmot*, afterwards Chief Justice of the Common Pleas; the very learned Mr. Justice *Foster*; and Mr. Justice *Dennison*. Was it a hasty decision? it was argued in two different terms by four of the most eminent advocates of that day, after which the Court took time to deliberate; and then Lord *Mansfield* delivered a clear,

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lucid, and argumentative judgment of himself, and his three most learned brethren; and commented upon the cases of *Bailey* v. *Bunning*, and *Lechmere* v. *Thorowgood*, in a way which shows, at least, that they had by no means been overlooked by them. The case of *Cooper* v. *Chitty* is best reported in the first volume of *Lord Kenyon's Cases*, p. 395., although there is no material difference between *Kenyon*, *Blackstone*, and *Burrow*; and whoever reads with attention Lord *Kenyon's* note, though his Lordship was then a very young man, will discover all the accuracy and acuteness of that great mind, so well remembered by us who saw him, as many of us saw him, in the full splendour of it; and when reading this luminous judgment of Lord *Mansfield*, as reported by his eminent successor, I cannot but lament that in the course of some of the arguments in the case now under consideration, Lord *Mansfield* should be charged with making a very useless display of what would appear to be legal knowledge, and filling up six pages with what might have been expressed in six lines. I am sorry to say the judgments of modern days cannot claim a superiority in conciseness and beauty above those of Lord *Mansfield*. Were I, after the discussion this case has undergone at the bar, and after the luminous argument of my Brothers who have preceded me, to travel through and to comment upon all the cases since *Cooper* v. *Chitty*, which have been uniform, I should indeed be justly chargeable with making useless display of legal knowledge. I shall merely mention them, and a host of learned persons who have affirmed the doctrine.

Smith v. *Milles* (*a*) was an action of trespass, and *Ashurst* and *Buller* Justices, after time taken to consider, held it would not lie, but expressly took the distinction between trover and trespass; and a long

(*a*) 1 *T. R.* 475.

passage

passage of Lord *Mansfield*'s judgment in *Cooper* v. *Chitty* is read by Mr. Justice *Ashurst*, and adopted by the Court. Mr. Justice *Ashurst* was not an eloquent man, but he was always reckoned a learned Judge; and of the high legal character of Mr. Justice *Buller* all the profession formed a very just estimate. In *Potter* v. *Starkey* (*a*), Mr. Baron *Wood* first, and the whole Court of Exchequer, held that the sheriff was liable in trover, though he seized, sold, and actually paid over the money before a commission issued, and before any notice; saying that this necessarily followed from *Cooper* v. *Chitty*, for it was an unlawful interference with another's goods. In *Stevens* v. *Elwall* (*b*) it was held that a servant may be charged in trover though the act of conversion be done for the benefit of the master, and Lord *Ellenborough* observed that the Court must be governed by the principles of law, and not by the hardship of any particular case. *Wyatt* v. *Blades* (*c*) is supposed (in the judgment we are now considering) not to shew sufficiently what the opinion of Lord *Ellenborough* was, nor whether the point now under consideration was there raised. The facts of that case were similar to those now before us; and it seems to me impossible that Lord *Ellenborough*, though the counsel might not have stated the case with much precision, could have decided as he did if he had not had the supposed point of *Cooper* v. *Chitty* in his view. The case of *Lazarus* v. *Waithman* (*d*) was decided by the Court of Common Pleas, during the Chief Justiceship of Sir *R. Dallas*, in the same way as *Cooper* v. *Chitty* was. I speak not of any opinion of mine in that case, but I can speak of two of the Court, happily still alive, though no longer of our body, — two better lawyers could not be found, — I

(*a*) 4 *M.* & *S.* 260.
(*b*) 4 *M.* & *S.* 259.
(*c*) 3 *Campb.* 396.
(*d*) 5 *B. M.* 314.

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mean my Brothers *Burrough* and *Richardson*. The former states the point to have been settled long before he knew *Westminster Hall*; the latter (and no man had more practical experience) says, that the law, as to a question of this nature, had been long since settled, and had frequently occurred of late years at *Nisi Prius*. There must have been an accidental mis-statement in the judgment below, when it is supposed that *Lazarus* v. *Waithman* was decided altogether upon *Cooper* v. *Chitty*, and that none of the earlier cases were mentioned; those who know, as I of course did, the infinite pains that that most valuable person Lord Chief Justice *Dallas* took to inform himself, by diligent research, and to procure information from others of every case and decision that at all bore upon matters before him, will not readily believe he was not aware of the case of *Bailey* v. *Bunning* and *Phillips* v. *Thompson*; but it unfortunately happens that, even if the Lord Chief Justice of that day were not entitled to all the commendation I most cheerfully and affectionately bestow upon him, the very cases supposed to have been overlooked by the Judges *Dallas*, *Burrough*, *Richardson*, and myself, were expressly quoted and relied on by the learned counsel for the sheriff in *Lazarus* v. *Waithman*, and in *Price* v. *Helyar*. (*a*) We have to add the weight and authority of that very eminent and acute Judge Lord Chief Justice *Best*, delivering a most luminous argument after time taken to consider, as the joint opinion of his Lordship, myself, and Mr. Justice *Burrough*, the facts of that case being not possibly distinguishable from this. But the weight of authority and of name, does not rest here: for in *Carlisle* v. *Garland* (*b*), Lord Chief Justice *Tindal*, my Brothers *Bosanquet* and *Alderson*, all maintained the same point;

(*a*) 4 *Bingh.* 597. (*b*) 7 *Bingh.* 298.

and

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and again, that most eminent, and ever to be lamented Judge, Lord *Tenterden*, with the concurrence of my Brothers *Littledale*, *Taunton*, and *Patteson*, in *Dillon* v. *Langdale* (*a*), expressly like this case in every circumstance, says, "the sheriff must obey the writ, but he is also required to know whose goods he takes; we ought to consider ourselves bound by the many decisions which have taken place, establishing the liability of the sheriff." And then his Lordship refers to the case of *Carlisle* v. *Garland* as in point. Indeed, it is admitted in the court below, that the cases of *Potter* v. *Starkey*, *Lazarus* v. *Waithman*, *Price* v. *Helyar*, *Carlisle* v. *Garland*, and *Dillon* v. *Langdale*, cannot be distinguished either in facts or reasoning from the case now under consideration. I have formerly referred to the case of *Glasspool* v. *Young* as a much harder case against the sheriff than the present; and I shall not restate it; I only mention it for the sake of adding to the list of legal luminaries, who, for the last seventy-six years, have uniformly concurred in this opinion till now; the names of two eminent judges, Mr. Justice, now Baron, *Bayley*, and Mr. Justice *James Parke*. If, therefore, I even thought the case of *Cooper* v. *Chitty* wrongly decided, as some of my brethren seem to think, I do not feel myself strong enough, nor do I think myself justified in setting up my judgment against the immense host of those great men, who have so long considered this as a close and settled point of law.

I may add, without impropriety, that Lord *Tenterden*, in a conference with all the Judges who had heard this case argued, concurred in the opinion I have formed; and when the opinions of that most eminent, most learned, and ever to be lamented Judge, as well as humblest, and most unassuming of men are mentioned, they will

(*a*) 2 *B.* & *Ald.* 131.

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claim and receive from every other judge and lawyer, the most profound and unfeigned attention and respect, especially when I find him in a case having no connection with this, declaring that the judges of former times (and I speak of the uniform judgment of about seventy years) ought to be followed and adopted, unless we can see very clearly that they are erroneous; otherwise there will be no certainty in the administration of the law. When, therefore, I find this law uniformly acted upon for much above seventy years, I rejoice, after a long judicial life, to declare my firm belief, that a new practice on this point should not be introduced. I think it cannot be done without danger. For these reasons, and upon these authorities, I think the judgment of the Court of Exchequer ought to be reversed.

TINDAL C. J. It has become unnecessary for me, after the full discussion which this case has undergone, to state at length the grounds upon which my judgment has been formed, or to comment upon the several cases which have been already brought before the notice of the Court. I shall endeavour, therefore, to compress within as short a compass as is consistent with making myself intelligible, the reasons upon which my mind has been brought to the conclusion that the judgment of the court below ought to be reversed.

The question arising upon this special verdict, is in substance this; whether the sheriff, who has seized the goods of a Defendant under a writ of *fi. fa.*, and has sold and delivered them to the judgment-creditor in satisfaction of the debt, after a secret act of bankruptcy committed by the Defendant, but before the issuing of a commission against him, is liable to an action of trover, at the suit of assignees subsequently chosen under such commission. And upon this question I can arrive at no other conclusion, upon the construction

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struction of the statute upon which the bankrupt law now stands, without any reference to the cases decided on the point, than that the seizing and subsequent sale of these goods to the judgment-creditor, is a wrongful conversion, so as to make the sheriff liable in an action of trover.

This answer to the question above put, rests upon two distinct propositions; first, that the goods in question were, at the time of the sale under the writ, the property of the assignees, having become their property by relation from the time of the act of bankruptcy; secondly, that there is no exception, either express or implied, in the bankrupt act, in favour of a sheriff executing the king's writ. I shall proceed to consider each of these positions separately, and in order.

First, upon the just construction of the late statute, the goods at the time of the sale belonged to the assignees, and the sale was a wrongful conversion, because it was a sale of their goods.

That the ownership of the goods was not divested out of the bankrupt by the act of bankruptcy, or by the issuing of the commission, or by any other act than the execution of the commissioners' assignment, may indeed be readily admitted. If any authority were necessary for that point, the cases of *Cary* v. *Crisp* (*a*) and *Brassey* v. *Dawson* (*b*) are decisive upon the subject.

But it seems equally clear, that by the necessary construction of the clause, by which the commissioners are directed to "assign all the bankrupt's money, goods, chattels, and debts, wheresoever they may be found or known;" such assignment, whenever made, shall operate by relation, so as carry to the assignees all the property which the bankrupt had at the time of the act of bankruptcy.

(*a*) 1 *Salk.* 108. (*b*) 2 *Str.* 978.

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The twelfth section of the recent act 6 G. 4., upon which the law now stands, varies indeed in some particulars of expression from the language of the earlier acts; but not so materially as to afford a ground for any difference of construction in this particular; in which it is certain no real difference could have been intended. It has indeed been observed, in *one* case, by Lord *Hardwicke*, then Chief Justice of the King's Bench, —in *Brassey* v. *Dawson* (*a*)— that this relation is a fiction of the law, and that fictions are not to be favoured. But I must confess myself unable to consider it as any fiction at all; for it appears to be the direct positive enactment of the legislature, expressed in plain and unequivocal terms. That such an enactment is indeed attended in some cases with hardship must be admitted, but there seemed to have been no alternative for the legislature but either to allow these individual cases of hardship, or to submit to a general inconvenience; for unless the assignees were made to take the property of the bankrupt as it stood at the time of the bankruptcy, this general inconvenience must follow, that the estate would be subject to all the fraudulent or improvident dispositions and conveyances which failing men, in a state of bankruptcy, will inevitably have recourse to. That such relation was intended is evident from the consideration, that in various instances where the individual hardship was greater than was warranted by the general convenience, the legislature has from time to time, by new statutes, cut down the relation in particular cases; as, first, in the case of payment of debts *to* the bankrupt before notice of an act of bankruptcy (1 *Jac.* 1. *c.* 15.); next, in the case of the sale of real property *by* the bankrupt, where the commission is not sued out within five years after the secret act of bankruptcy (21 *Jac.* 1. *c.* 19.);

(*a*) 2 *Str.* 978.

c. 19.); again, in the case of payments *by* the bankrupt to creditors for goods sold (19 *G.* 2. *c.* 32.); and, lastly, in the case of conveyances, contracts, and other dealings and transactions with bankrupts *bonâ fide* made and entered into more than two calendar months before the date and issuing of the commission (46 *G.* 3. *c.* 65.). All which provisions of the legislature do prove and establish two points, first, that such relation to the act of bankruptcy did at the time exist under the previous enactments; and, secondly, that nothing short of the authority of parliament itself was sufficient to relax the severity of the former law. The courts of law have uniformly held such construction of the bankrupt acts. I will refer to one case only, namely, the judgment of Lord *Hardwicke*, when Chancellor, in *Billon* v. *Hyde* (*a*), because it appears to me to import that at that time he did not consider this relation to the act of bankruptcy to be a fiction of law. Lord *Hardwicke* observes, "It is said that this rule, (the relation to the act of bankruptcy,) founded on this act of parliament, is contrary to the general reason of the law, which says that fictions of law and legal relations shall not enure to the wrong of any one, which is a general rule, invented to support the right and equity of the case. But the reason of taking this case out of that rule, is plainly this, and the law did intend it on this general rule, that it is better to suffer a particular mischief than an inconvenience: and the legislatnre foresaw that there would be a particular mischief which they cured by that proviso, but did not extend it further, because the inconvenience on the other hand, of suffering bankrupts to dispose of their effects by contracts or judgments, would put it in their power to defeat their just creditors of their debts, so that it would be difficult commonly to find out whether

(*a*) 2 *Ves.* 310.

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there was a mixture of fraud; so the legislature thought it better to lay down that general rule."

Upon these grounds it may, I think, be safely concluded, that all the property belonging to the bankrupt, at the time of his bankruptcy, passes to his assignees by the commissioners' assignment, whatever may be the time at which such assignment is executed.

The second ground above referred to is, that there is no exception, express or implied, in the bankrupt act, in favour of the sheriff executing a writ after a secret act of bankruptcy; so that whilst servants of the bankrupt, judgment-creditors, who set the law in motion, vendees at the sheriffs' sale, and all other persons who assist in selling, disposing, or removing the goods of a bankrupt after a secret act of bankruptcy, would confessedly be held guilty of a wrongful conversion, neither is the sheriff, by reason of his situation and character, exempted from the same liability. That there is no *express* exception, is evident from perusing the words of the statute; if there be any exception, therefore, it must be one that is implied.

Now, the only ground upon which such implied exception in favour of the sheriff is contended for, resolves itself at last into the hardship of his case: it is said to be a hard measure to make him answerable where he is obliged to execute the writ, where he is acting honestly in the execution of his duty, and is under an invincible ignorance at the time, that the goods are the property of the assignees.

The question therefore is, whether such hardship upon the sheriff can be held upon any legal grounds to work an exception in his favour. If once this principle were to be admitted, it would operate not only in cases where the ignorance of the sheriff was really invincible, but in many others where a small exercise of caution, enquiry, and investigation would have been sufficient to have

have prevented him from executing the writ: such a construction, therefore, in order to prevent a mischief to the individual in a few cases, would occasion an inconvenience to the creditors at large.

Again, in how many other cases does the law hold him responsible where he is equally honest in the performance of his duty, and his difficulty in choosing the right course is equally great?

In an execution against *A.*, if he sells the goods of *B.* which are in *A.*'s possession and apparent ownership, by loan or otherwise, he is liable in trover to the rightful owner, even after he has paid over the money.

If bail are tendered to him, which appear sufficient at the time, he is bound to accept them, and to discharge the Defendant from his custody; yet, if they fail before bail above is put in, the sheriff may become answerable in damages to the Plaintiff, and not improbably for the amount of the debt.

He is answerable generally civiliter, for all acts of his bailiffs; for voluntary escapes permitted by them, and for extortion. If the hardship is urged in those cases, the answer is, that the officers give security to the sheriff; but it is obvious, that if their securities fall short, he is answerable to the party in his purse or in his person.

I would refer to the late case of *Glasspoole* v. *Young and Others* (*a*), already stated by my Brothers *Parke* and *Taunton*, where the sheriff was held liable for the execution of his duty, under circumstances of ignorance equally invincible as the present.

By analogy, therefore, to the law by which the sheriff's responsibility is governed in many other cases, the mere circumstance of hardship ought not to form any ground of exemption from his liability in this particular case.

(*a*) 9 *B.* & *C.* 696.

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After all, the office of sheriff is an office not only of risk, but one of profit also. So says Lord *Mansfield*, expressly, in the case of *Cooper* v. *Chitty*, so often referred to; an office, of which men are ready to take the risk upon themselves for the sake of the profit, in the character of under-sheriffs, bailiffs, and other officers, giving the sheriff a sufficient indemnity to secure him against any damage or loss from acts done by them in his name.

But the strongest argument against implying an exception in favour of the sheriff, appears to my mind to be the course pursued by the legislature itself, above adverted to; who have, by new and distinct statutes, from time to time, created new exceptions from the retrospective operation of the assignment, wherever the hardship to individuals was deemed sufficient to call for it. And as the legislature has so done in many cases, but not interfered in the present, why is such exception to be ingrafted upon the statute by us, whose duty it is to declare the law, and not to make it?

Upon these grounds, it appears to me, that no exception of any kind exists in the bankrupt act in favour of the sheriff, however honestly or innocently he may have acted in the execution of the writ directed to him, if he does, in fact, take under it not the goods of the Defendant to the suit, but those of his assignees. And this appears to me to dispose of the whole point in controversy, for if the sheriff appears to be liable to the action upon the construction of the statute itself, without reference to any of the cases on the point, I think it must at once be admitted, there is no such weight of authority in favour of the sheriff from the decided cases, as to call for any contrary decision.

Indeed, the weight of authority to be derived from the cases subsequent to that of *Cooper* v. *Chitty*, seems to be admitted in the argument of this case in the Court of

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of Exchequer, to be against the sheriff; but it is contended, that all the latter cases proceeded partly upon a misconception of the case of *Cooper* v. *Chitty*, and partly on the ground, that the earlier cases of *Bayley* v. *Bunning*, and some others, had not been brought to the attention of the courts of law when deciding such latter cases. I shall satisfy myself, therefore, with making a few observations upon the two cases of *Cooper* v. *Chitty*, and *Bayley* v. *Bunning*, as the learned Judges who have preceded me in argument have entered into a more laboured detail of the modern cases; and I would only observe, that they form a connected chain of decisions against the sheriff, some in each court of common law at *Westminster Hall*, for the last sixty years.

Now, with respect to the case of *Cooper* v. *Chitty*, it may be admitted at once that it forms no authority for the present case. The seizure by the sheriff was indeed after a secret act of bankruptcy, but the sale did not take place until after the assignment, and at a time when both commission and assignment were known to the sheriff. There could, therefore, be no doubt but that such a sale, with such notice, was a wrongful conversion by the sheriff. Although, however, the facts of that case do not agree with the present, the judgment of Lord *Mansfield* lays down and adopts a broad distinction between the liability of the sheriff in an action of trespass, and his liability under the same state of circumstances in an action of trover; holding that the former action was not maintainable, but that the latter was. And it seems a sensible and rational distinction, that the sheriff having acted innocently in the taking, should no be liable in that form of action in which the jury may give damages for the taking, distinct from the value of the goods, but that he should, nevertheless, be subject to that action in which the proper measure of damages is the actual loss which the plaintiff has sustained by the

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sale. And the case of *Bailey* v. *Bunning*, when rightly understood, affords no authority in favour of the sheriff where he has *sold* the goods. Upon looking at the record in that case, it appears that it was an action against *Mawley* the judgment-creditor, and *Bunning*, the bailiff of a hundred within the county of *Northampton*. The bailiff seized the goods after a secret act of bankruptcy, but he never sold the goods at all. For the jury expressly find, "that the money, goods, and chattels still remain in the hands of *Bunning*, neither sold nor delivered to *Mawley*." And upon this finding, the jury declare their doubt to be whether the goods were well *taken or not* by pretext of the writ of *fi. fa.?* Certainly a very inartificial finding; and the Court, after argument, and time to consider, held that the *original taking was lawful*. The reporters do indeed put the decision upon the ground of the official character of the sheriff, because the taking by him was lawful by virtue of the writ. But if the bailiff in that case, as in the present, had not only *seized* the goods, but had *sold* them, or delivered them over to the judgment-creditor, there is nothing in the case of *Bailey* v. *Bunning* to shew that he would not have been held guilty of a wrongful conversion. I look upon the case of *Bailey* v. *Bunning*, therefore, to be a single case, standing upon very peculiar circumstances, and decided upon very narrow grounds; and that, in effect, it says no more than that, if the sheriff makes a seizure in obedience to a writ, which seizure is lawful at the time, then, if he neither sells the goods, nor delivers them over to the judgment-creditor, but keeps them in his own hands as a stakeholder between the assignees and the judgment-creditor, the original act of taking shall not be held unlawful so as to sustain an action of trover. To that extent it shews the bailiff was favoured in his official character, but no further. But why, under the circumstances stated in

that

that special verdict, a subsequent demand by the assignee, and a refusal to deliver up the goods to him, should not have been held a conversion, if the special verdict had been properly framed, I confess myself wholly unable to discover.

But although the judgment of Lord *Mansfield*, in the case of *Cooper* v. *Chitty*, propounds a distinction between the responsibility of the sheriff, in the form of trespass and in the form of trover, not called for by the circumstances of that case, no one can deny that such distinction has been adopted in numerous decisions in the courts of *Westminster Hall*, from that time to the present. It has been inserted in text writers on the law of bankrupt, as a distinction established by undoubted authority. It is laid down in digests of the law, as an acknowledged principle. It has been acted upon by the practisers in *Westminster Hall* of the present day, during the whole of their lives, without the slightest suspicion or doubt of its soundness. Judicial decisions in courts of justice are ranked by Lord *Hale* as one of the grounds or constituents of the common law. (*Hale's Hist. Co. L. c.* 4.) And if a series of judicial decisions are shewn, some in each court of *Westminster Hall*, from the time of *Cooper* v. *Chitty* down to the present period, in which the sheriff has been held liable in trover, for seizing and selling after an act of bankruptcy, but before a commission; if neither the case of *Cooper* v. *Chitty*, nor the cases which preceded it, do, when rightly understood, contravene that principle; surely the question should be considered as at rest, even if the principle on which it was originally established were involved in doubt.

I cannot conclude without adding a much greater weight to the opinion which I have formed, than that which might otherwise belong to it, by stating, that upon the discussion of this case amongst the Judges after the

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argument, the late eminently learned and accurate Lord Chief Justice of the King's Bench, declared it to be his opinion, that from the numerous decisions in the courts of *Westminster Hall*, the law was settled against the sheriff, so that it was no longer a subject for argument; and that even if the question were *res integra*, he should come to the same conclusion.

For the reasons, therefore, which I have stated above, I think the present judgment should be reversed.

Judgment reversed.

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GOODBURNE *v.* BOWMAN and Others.

1. To an action for a libel charging Plaintiff with having in two mayoralties bought coals at 6*d.* a bushel, having sold them to the poor at 4*d.*, and having charged the corporation 8*d.*, thereby pocketing 2*d.* a bushel, Defendants pleaded that Plaintiff did this in his first mayoralty, and in his second altered his charges, buying the coals at 6*d.*, selling them to the poor at 3*d.*, and charging the corporation 6*d.*:

Held, ill.

2. The Court will not award a repleader except where complete justice cannot be answered without it.

THE first count of the declaration stated, that long before the committing of the several grievances by the Defendant, as thereinafter next mentioned, there had been and still was in the town or borough of *Richmond*, in the county of *York*, a certain body politic and corporate, consisting of one mayor, twelve aldermen, and an indefinite number of free burgesses; and that for divers, to wit twenty years next before the committing of the several grievances, the mayor of the said town or borough, for the time being, at the expense of the body politic and corporate, annually provided, and still did provide, a quantity of coals to be distributed amongst the poor at a reduced price; that in the year 1824, one alderman *William Terry* became and was mayor of the said town

and

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and borough; and in the year 1814, and also in the year next preceding the mayoralty of *W. Terry*, the Plaintiff had been and was mayor of the said town or borough, and as such mayor, had provided coals at the expense of the corporation, to be distributed amongst the poor at a reduced price, as thereinbefore mentioned; and had distributed, and caused the same to be distributed accordingly, to wit, at, &c.; yet the Defendants, well knowing the premises, but contriving, &c. to injure the Plaintiff in his good name, &c. falsely, wickedly, and maliciously did compose, print, and publish, and caused and procured to be composed, printed, and published, of and concerning the Plaintiff, and of and concerning the conduct of him the said Plaintiff when mayor of the town or borough aforesaid, during the several years in that behalf mentioned, and of and concerning the purchase of coals by the mayors of the said town or borough, and the distribution of the same as thereinbefore mentioned, and of and concerning the mayors of the said town or borough, and of and concerning the body politic and corporate, a certain false, scandalous, malicious, and defamatory libel, containing therein the false, scandalous, malicious, libellous, and defamatory matter following, of and concerning the Plaintiff, and of and concerning the conduct of him the Plaintiff when mayor of the said town or borough, and of and concerning the purchase of coals by the mayor of the said town or borough, and the distribution of the same; and of and concerning the mayors of the said town or borough, and of and concerning the body politic and corporate; that is to say, "It is well known that the mayor, at the expense of the corporation, annually provides a quantity of coals, to be distributed amongst the poor at a reduced price. The price of coals was 6*d.* per bushel, or in summer a little lower. The poor were charged 4*d.* per bushel. The mayor charged the cor-

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poration 4*d.* per bushel more, making 8*d.* per bushel, and thus pocketed 2*d.* per bushel for the coals distributed amongst the poor. Who, let me ask, detected this peculation, and had it remedied? The alteration in the price was made in Mr. Alderman *Terry*'s mayoralty." Meaning thereby, that the persons who had filled the office of mayor previously to the mayoralty of the said alderman *Wm. Terry*, during the period in which coals had been provided and distributed as hereinbefore mentioned, and amongst others, the Plaintiff, had, as such mayor, been guilty of peculation in the purchase of the said coals at the expense of the corporation, and the distribution of the same amongst the poor.

The Defendants pleaded, first, not guilty; and then six special pleas of justification, none of which, taken singly, contained any complete confession of the matters charged in the declaration; but taking together the whole of the allegations in the respective pleas, they amounted to a confession of the cause of action. The sixth special plea, on which the Defendants mainly relied, was as follows: —

That long before, and at the time of composing, printing, and publishing, and causing, and procuring to be composed, printed, and published, the supposed libel in the first count of the declaration mentioned, to wit, on, &c., at, &c., *George Craft*, the younger, was a common councilman of the town and borough of *Richmond*, and continued to be such common councilman for a long space of time, to wit, until the 20th day of *April*, 1830, to wit, at, &c. That before the composing, printing, and publishing of the supposed libel in the first count, mentioned, to wit, on, &c., in 1814, at, &c., the Plaintiff was mayor of the said town and borough, and continued mayor thereof until the expiration of his year of office; and that *John Foss*, before the composing, printing, and publishing of the supposed libel in the first

first count mentioned, to wit, on, &c., in 1822, at, &c., was mayor of the said town and borough, and continued mayor thereof until the expiration of his year of office; and that the Plaintiff, before the composing, printing, and publishing of the supposed libel in the first count mentioned, to wit, on, &c., in 1823, at, &c., was mayor of the said town and borough, and continued mayor thereof until the expiration of his year of office: that the said alderman *W. Terry*, before the composing, printing, and publishing, and causing and procuring to be composed, printed, and published, the supposed libel, to wit, on, &c., in 1824, at, &c., was mayor of the said town and borough, and continued mayor thereof, to wit, until the expiration of his year of office at, &c. That the Plaintiff, whilst he was so mayor of the town and borough as in the plea first mentioned, to wit, on the 20th of *June* 1814, at the expence of the body politic and corporate, provided a large quantity, to wit, 360 bushels of coals, to be distributed amongst the poor at a reduced price. That the price of coals, during a large part of that mayoralty of the Plaintiff, to wit, for eight months thereof, was a large sum per bushel, to wit, the sum of 6*d.*; and during the other part of that mayoralty, to wit, for four months during the summer thereof, the price of coals was a little lower, to wit, the price of 5½*d.* per bushel; and that the same were distributed amongst the poor at a reduced price of 4*d.* per bushel, to wit, at, &c. That afterwards, and after the expiration of that mayoralty of the Plaintiff, to wit, on the 8th of *April* 1815, at, &c., at a meeting of the body politic and corporate, the Plaintiff exhibited and passed an account of his receipts, charges, and disbursements as such mayor as aforesaid, and therein charged to the said body politic and corporate the sum of 4*d.* per bushel for each and every bushel of the coals so distributed as aforesaid, over and besides, and in addition to the

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said sum of 4*d.* per bushel charged to the poor as aforesaid; and the additional charge of 4*d.* per bushel was then and there by the said meeting allowed to the Plaintiff. That *John Foss*, whilst he was so mayor of, &c., at the expense of the body politic and corporate, in like manner provided a large quantity, to wit, 357 bushels of coals, to be distributed amongst the poor at a reduced price; and that the price of the coals, during a large part of the mayoralty of *John Foss*, to wit, for eight months thereof, was a large sum per bushel, to wit, the sum of 6*d.* per bushel; and during the other part of the said mayoralty, to wit, for four months during the summer thereof, the price of coals was a little lower, to wit, the price of 5½*d.* per bushel; and that the same were distributed amongst the poor at a reduced price, to wit, the price of 4*d.* per bushel, to wit, at, &c. That afterwards, and after the expiration of the mayoralty of *John Foss*, and during the mayoralty of the Plaintiff, to wit, on the 14th of *April* 1823, at, &c., at a meeting of the said body politic and corporate, the said *John Foss* exhibited and passed an account of his receipts, charges, and disbursements as such mayor, and therein charged to the body politic and corporate the sum of 4*d.* per bushel for each and every bushel of the coals so distributed, over and besides, and in addition, to the sum of 4*d.* per bushel charged to the poor as aforesaid; and that *George Croft* the younger, at such last mentioned meeting, pointed out and objected to such additional charge of 4*d.* per bushel, and then and there stated that the said last mentioned coals might have been purchased at 5½*d.* or, at most, at 6*d.* per bushel; but the Plaintiff, who was then and there present at such meeting, and as such mayor, as aforesaid, presided thereat, then and there stated, and asserted, that such additional charge of 4*d.* per bushel had usually been allowed to the mayor of the said town or borough for the time being; and the additional

additional charge of 4*d.* per bushel was then and there accordingly allowed by the meeting to *John Foss*. That the Plaintiff, whilst he was such mayor as last aforesaid, also provided, at the expense of the body politic and corporate, a large quantity, to wit, 356 bushels of coals, to be distributed to the poor at a reduced price; and that the prices of coals, during the Plaintiff's last mayoralty, was a certain sum per bushel, to wit, the sum of 6*d.* per bushel, and that the same were distributed to the poor at a reduced price, to wit, the price of 3*d.* per bushel, to wit, at, &c. That the Plaintiff, after the expiration of the last mentioned mayoralty, and during the mayoralty of the said *W. Terry* as in the first count mentioned, to wit, on, &c., at, &c., at a certain other meeting of the body politic and corporate, exhibited and passed an account of his receipts, charges, and disbursements as such mayor as last aforesaid, and that an alteration then and there took place in the additional sum of 4*d.*, so wrongfully charged to the said body politic and corporate; and the Plaintiff then and there charged in his account, and was allowed a lesser sum, only, to wit, the sum of 3*d.* per bushel, over and above the sum of 3*d.* so charged to the poor as aforesaid. And this, &c.; wherefore, &c.

To the special pleas, the Plaintiff replied *de injuria*, &c.; and at the trial before *James Parke* J., last summer assizes for the county of *York*, the jury found for the Plaintiff on the general issue, and also upon the issue raised on the 5th plea of justification, with one farthing damages; and for the Defendants on the other issues.

In *Michaelmas* term last, the Plaintiff moved for leave to enter up judgment, *non obstante veredicto*, on the several issues found for the Defendants, on the ground that the pleas on which those issues were raised, were bad in law; inasmuch as they did not state that the coals, which had been provided by the Plaintiff, had been

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been *in fact* purchased for less than the Plaintiff charged for them, but merely that they *might have been* purchased for less by the Plaintiff.

Bompas Serjt. shewed cause. If the pleas are bad, neither party can have judgment; the Plaintiff himself having tendered immaterial issues instead of demurring. And there must be a repleader, for none of the pleas, taken singly, confess the cause of action, and each must stand or fall on its own merits. In *Lambert* v. *Taylor* (*a*), Lord *Tenterden* says, "The plea being bad, the Defendant certainly cannot have judgment, although the issue is found for him, the issue being taken on an immaterial matter. And the question whether the Plaintiff can have judgment, or whether there ought to be a repleader, depends upon the question whether the plea does or does not contain a confession of a cause of action; if a cause of action be confessed by the plea, and the matter pleaded in avoidance be insufficient, the Plaintiff is entitled to judgment, notwithstanding the verdict. If the plea does not confess a cause of action, there must be a repleader." *Pitts* v. *Polehampton* (*b*), *Staples* v. *Heydon.* (*c*)

And the circumstance of the Plaintiff's having a verdict upon the general issue, will not dispense with the necessity of a repleader; for, in *Rex* v. *Roger Philips* (*d*), Lord *Mansfield* says, "The rule of law as to such an immaterial issue joined, and verdict upon it is, 'that when the finding upon it does not determine the right, the Court ought to award a repleader, unless it appears from the whole record, that no manner of pleading the matter could have availed.'"

Assuming, however, that the cause of action is sufficiently

(*a*) 4 *B.* & *C.* 152.
(*b*) 1 *Ld. Raym.* 390.
(*c*) 2 *Ld. Raym.* 922.
(*d*) 1 *Burr.* 301.

ficiently confessed, the sixth plea, at least, contains an answer to this action, on the merits. The facts set out, disclose peculation committed by the Plaintiff, which is the substance of the charge complained of in the declaration; and after verdict, it must be taken that such charge has been established in proof.

Jones and *Stephen* Serjts. in support of the rule, were directed by the Court to confine themselves to the sufficiency of the plea upon the merits, after verdict. They contended, that the facts set forth in the plea nowhere shewed, that in both his mayoralties the Plaintiff had pocketed 2*d.* per bushel, the difference between the price at which the coals were purchased, and the price at which they had been charged to the corporation; which was the substantial allegation of the libel. The price which the Plaintiff himself paid for the coals is nowhere stated. Consistently with the allegations in the plea, the Plaintiff may have provided the coals from his own pit, or the corporation may have allowed the extra charge as a compensation for the mayor's trouble, so that the charge of peculation is no where justified; and short of that, the plea is not sufficient. *Mounteney* v. *Walton* (*a*), *Lewis* v. *Clement*. (*b*)

Cur. adv. vult.

TINDAL C. J. The declaration in this action, which contained three counts, set forth a libel, imputing to the Plaintiff, who had been twice mayor of the borough of *Richmond*, that he had been guilty of peculation during his mayoralty, by pocketing 2*d.* per bushel for coals, which had been provided by him as mayor, to be distributed amongst the poor at reduced prices. To this declaration the Defendants pleaded the general issue, and

(*a*) 2 *B.* & *Adol.* 673. (*b*) 3 *B.* & *Ald.* 702.

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state the double four-pence to have been taken in the first mayoralty only, and alleges, that at the meeting of the corporation to pass the account of the second mayoralty, an alteration took place in the said additional sum of four-pence, so charged by *John Foss*, a prior mayor, to the corporation: and that the Plaintiff charged, and was allowed in his account, the sum of 3*d.* per bushel, over and above the sum of 3*d.* so charged to the poor as aforesaid; and does not allege that the Plaintiff, in that mayoralty, charged 4*d.* to either.

This makes it unnecessary to give any opinion upon the other objections taken to the pleas, *viz.*, that they do not allege what price the Plaintiff actually paid for the coals; and that, consistently with the allegations in the pleas, the Plaintiff may have provided the coals from his own pits, and therefore there is no justification of the charge of peculation which the libel expressly makes. Or again, that consistently with the allegations in the pleas, the corporation may have allowed the extra charge as part of the allowance made to the mayor for his execution of the office in general, or of that part of it which related to the providing and distributing the coals.

We are of opinion, in the first place, that, taking together the whole of the allegations in the respective pleas, they fully amount to a confession of the cause of action. But if this point were doubtful, it may not be improper to observe, that most of the cases in which the question respecting a repleader has been considered, were before the statute of *Anne*, when only one plea could be put upon the record. If, therefore, such plea did not contain a confession, there was no part of the record by which the deficiency could be supplied. In the present case there is a verdict upon the general issue, which finds that the Defendant did publish the libels. And, although in considering the merit or demerit

demerit of any individual plea, recourse cannot be had to another unless expressly referred to by such plea, yet as the application to enter the verdict is founded upon the whole record upon which it appears that the Defendant has committed the grievance complained of, and has not shewn any sufficient justification, it may be considered that in that point of view there is enough to warrant the application. But no rule is better established than this, that the Court will not grant a repleader except where complete justice cannot be answered without it. So the law is laid down by *Ashurst* J. in *Symmers* v. *The King* (*a*). In the present case, why should a repleader be granted in order to enable the Defendant to confess the ground of action more formally, when the Court see already upon the face of the record, that the jury have found him guilty of publishing the libels complained of, and attempted to be justified by the pleas? If it be said that the Defendant, in a new plea, might state new matter in avoidance of the action, what would that be in effect, but to allow him to take advantage of his own error in pleading? Upon the whole, we think the special pleas do sufficiently confess the action, but do not sufficiently avoid it; and, consequently, that the rule for entering the judgment for the Plaintiff, *non obstante veredicto*, must be made absolute.

Rule absolute.

(*a*) *Cowp.* 510.

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COLLINS and Others *v.* GWYNNE.

1. A bond given to commissioners by a collector of assessed taxes, and his surety, to secure due payment of monies collected, need not be stamped, although not taken in the precise amount required by 43 *G.* 3. *c.* 99. *s.* 13.

2. Such a bond need not be taken to his majesty and his successors.

3. The collector in default on such bond is a competent witness against his surety.

4. The sale of the collector's lands and goods is not a condition precedent to putting such bond in suit.

5. To pay money collected for a given year to the account of a different year, is a breach of the condition for due payment.

THIS was an action of debt on a bond entered into by the Defendant as surety for one *Richard Bigg*, a collector of assessed taxes for the year 1828 ending *April* 5th, 1829. At the trial before *Alderson* J., *London* sittings after *Trinity* term 1831, a verdict was found for the Defendant, with liberty reserved to the Plaintiffs to move to set it aside, and to enter a verdict for themselves for the penalty of the bond, and nominal damages for the detention of the debt, together with the sum of 693*l.*, or such part of that sum as the Court might think them entitled to as damages for the breaches of the condition of the bond in *Bigg*'s not duly paying over to the receiver-general the monies collected by him for the above year. The Plaintiffs accordingly moved to have the verdict entered for them, when it was ordered by the Court, with the consent of counsel on both sides, that the final entry, and verdict, and judgment, should abide the opinion of the Court on the following case:—

The Plaintiffs declared upon the bond, which was dated the 27th of *August* 1828, as having been entered into by the Defendant with the said *R. Bigg* and one *Samuel Cordozo*, jointly and severally, to the Plaintiffs, as three of the commissioners under the land tax and assessed taxes act, for the *Tower* division, in the county of *Middlesex*, in the penal sum of 4048*l.* To that declaration the Defendant pleaded various pleas. The first was *non est factum*, after craving oyer of the bond, and setting out the condition, which was as follows:

follows: — "Whereas the above bounden *Richard Bigg* hath been duly nominated and appointed by the commissioners appointed for putting in execution the said acts of parliament within the said division and county, one of the collectors of the rates and duties above mentioned, rated, laid, and assessed upon the parish of *St. Matthew Bethnal Green*, in the *Tower* division, and county of *Middlesex* aforesaid, for the year 1828, ending respectively the 25th of *March* and 5th of *April* 1829, Now the condition of this obligation is such, that if the above bounden *Richard Bigg* do and shall well and faithfully demand and collect all and every the sum and sums of money in the said assessments charged and specified, of the respective persons from whom the same shall or may be payable; and shall and do, in case of non-payment thereof, duly enforce the powers of the said acts against such persons who may make default therein; and well and truly pay, or cause to be paid, unto the receiver-general of the said taxes, rates, and duties for the said county of *Middlesex*, all such sum and sums of money as shall come to the hands of the said *R. Bigg* as such collector, upon the days and at the times by the said acts appointed for the payment thereof, and according to the true intent and meaning of the said acts; And also do and shall, when thereunto required, at such times and places as shall be appointed for that purpose, give and render, or cause to be given and rendered unto the commissioners appointed, or to be appointed, to put the said acts in execution, or to any two of them, a just and true account in writing of all such sum and sums of money which he the said *R. Bigg* shall have collected and received by virtue or on account of the said assessments, and shall forthwith pay and deliver the same unto the said commissioners, or any two of them, or unto such person or persons whom they or any two or more shall appoint, then this obligation shall be void, or else remain in full force and effect."

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The second plea was a general plea of performance of the condition of the bond, on which the Plaintiffs, in their replication, assigned several breaches, the third of which was, that *Bigg* had not duly paid over to the receiver-general the monies received by him as collector of the assessed taxes for the said division, in respect of the rates and assessments mentioned in the condition, viz., for the year 1828–9. On that, an issue was taken by the Defendant in his rejoinder. The issues on the third and fourth pleas, — that the bond was invalid on the ground of supposed fraud and misrepresentation; —on the ninth plea, that *Bigg* was not duly nominated to act as collector; — on the tenth plea, that the commissioners had not delivered to *Bigg* duplicate assessments, with a warrant for collecting them; — and on the twelfth plea, that *Bigg* had absconded to avoid the payment of the arrears due; — were all found for the Plaintiffs. The Plaintiffs had previously obtained judgment on demurrer to two more of the Defendant's pleas (*a*).

The fifth plea stated, that *Bigg* did demand and collect all the assessments, and that from that time to the time of exhibiting the present bill, he had lands, goods, and chattels within the jurisdiction of the commissioners, of which they had notice, and which might have been seized and sold by them, but which they neglected to sell. The sixth plea stated the same, only leaving out the mention of lands, and stated that he had the goods after default in payment of the monies collected, of which the commissioners had notice. The seventh stated, that after *Bigg* made default, he had goods and chattels within the jurisdiction of the commissioners, which they might have seized and sold, and which would have been sufficient to satisfy all *Bigg*'s deficiencies; but that the commissioners neglected to do this, as also to imprison *Bigg* himself; and that no receiver-

(*a*) See determination on the argument of the demurrers, 7 *Bingh.* 423.

general,

general, or deputy receiver-general, did or would call upon *Bigg* to make the payment of all sums received by him.

The eighth, — that the commissioners did not, at the times in the statute mentioned, call before them the said *Bigg*, and examine him upon oath or affirmation, and assure themselves of the sums paid to *Bigg* as such collector, or make any order thereon for the payment of the same to the receiver-general.

And the eleventh stated, that, although a large sum of money came to the hands of *Bigg*, the receiver-general did not call upon and hasten him to make payment of the same upon the days and at the times in the said acts provided and appointed.

To the fifth plea, the Plaintiffs replied that *Bigg* did not faithfully demand and collect all the assessments; that he had no lands within their jurisdiction which they could seize and sell of which they had notice; and that all the goods and chattels of the said *Bigg* within their jurisdiction, and of which they had notice, were seized and sold, and were inadequate to the satisfying the deficiencies of *Bigg*. To the sixth plea, — that they did seize all the goods and chattels of which *Bigg* was possessed within their jurisdiction, and of which they had notice, which, as before alleged, were insufficient to satisfy the deficiencies of *Bigg*. To the seventh, — that they did seize and sell all the goods and chattels of which *Bigg* was possessed within their jurisdiction, and that the same were insufficient to satisfy his deficiencies; and that the receiver-general of the said rates, duties, and assessments for the said county of *Middlesex*, did call upon *Bigg*, as such collector, to make payment of all sums received by him of the said duties, and that *Bigg* fled and absconded to places to the commissioners unknown to prevent their imprisoning him.

To the eighth, — that the said commissioners did call

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before them and examine *Bigg*, the collector, upon oath, and assure themselves of the sums paid to the said *Bigg*, and did make order thereon for the payment of the same to the receiver-general on the day and time appointed for receiving the same.

To the eleventh, — that the receiver-general did call upon and hasten *Bigg* to make such payments, upon the days and at the times in the said acts provided and appointed. And thereupon issue was joined.

To the replication of the Plaintiffs to the fifth plea, the Defendant rejoined, that after the receipt of large sums of money by *Bigg*, and his omission to pay the same to the receiver-general, *Bigg* had lands within the jurisdiction of the commissioners, which they might have seized and sold, but that they neglected so to do. To the sixth, — that the commissioners did not seize and sell all the goods and chattels of *Bigg* within their jurisdiction, in manner as the Plaintiffs had in their replication alleged. To the seventh, — that the receiver-general did not call upon *Bigg* as such collector, to make payment of all sums of money received by him of the said duties; nor did *Bigg*, before they could have imprisoned him, abscond and fly to places to the receiver-general, deputy receiver-general, and the commissioners unknown, in manner as the commissioners had in their replication alleged. To the eighth, — that the commissioners did not, at the times mentioned in the replication, and as often as was necessary, call before them the said *Bigg*, and examine him upon oath or affirmation, and assure themselves of the sum or sums of money paid to the said *Bigg* as such collector, nor did they make any order thereon for the payment of the same to the receiver-general. On which several rejoinders issue was joined.

The execution of the bond was admitted at the trial, subject to a question reserved, first, as to the necessity of a stamp, which it had not, although, as to the penalty and

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and condition, it was not conformable to 43 G. 3. c. 99 (a); secondly, whether it was valid, not being made to his Majesty, his heirs and successors, pursuant to the statutes, particularly the 3 G. 4. c. 88.

The material issues for the consideration of the Court were, first, whether *Bigg* duly paid to the receiver-general all such sums as had been collected by *Bigg*, according to the true intent and meaning of the assessed tax acts, for the years 1828–9. Secondly, whether *Bigg* had lands, which the commissioners could have seized and sold under the 43 G. 3. c. 99. s. 52. Thirdly, whether *Bigg* had goods which the commissioners could have seized and sold. Fourthly, whether the commissioners had examined *Bigg* on oath as to the sums which he had collected, and had made any order for the payment of the same to the receiver-general, according to the 39th section of the 43 G. 3. c. 99. And fifthly, whether the receiver-general did call upon and hasten *Bigg* to make such payment, upon the days and times, by the said acts in that case made and provided, appointed for the same. The two last of these issues had been found for the Defendant, and the question on that part of the case was, whether the Defendant's eighth and eleventh pleas, which were grounded on the neglect of the commissioners and the receiver-general, respectively, were good or bad in point of law after verdict.

With reference to the other three material issues above noticed, there was no sufficient evidence against the Defendant, unless *Bigg* was a competent witness; and upon his being received as a witness after objection made by the Defendant's counsel, the jury found that *Bigg* had paid over to the receiver-general, all the sums received by him for assessments for the year 1828-9, but that he did not pay in all those sums to the service of that year, the sum of 2430*l.* only having been paid by

(a) See 7 *Bingh.* 423.

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Bigg to the service of that year, and 609*l.*, the residue of the sums so received, having been expressly paid by him to the service of former years, during which he had also been collector; but the Defendant had not been his surety during those former years. It appeared in evidence, that that sum had accordingly been passed to the credit of *Bigg*'s account of those former years, and a receipt given for the amount of those years, his account for which was completely paid up. The jury also found, that *Bigg* had lands or houses after his alleged default in paying the latter sum, of the value of 121*l.*, which could have been seized and sold by the commissioners under the 43 *G.* 3. *c.* 99. *s.* 52.; and that he had goods after such default of the value of 200*l.*, which could have been seized and sold by the commissioners; but that the commissioners had not notice that *Bigg* was possessed of any houses, lands, or goods, at the time of his default. The jury however found, that the commissioners had reasonable grounds for believing that he possessed household goods at the time, of the value of 200*l.*, which might have been seized and sold.

The question for the opinion of the Court was, whether a verdict should be finally entered for the Plaintiffs for the penalty of the bond and nominal damages, and also for the said sum of 693*l.*, or any and what part of that sum as damages on the third breach assigned in the replication; or, whether the Defendant was entitled to have a verdict entered for him on the issue taken on the third breach, or to judgment on his fifth, sixth, seventh, eighth, or eleventh pleas; or a nonsuit. The case was argued in *Easter* term 1832, by

Taddy Serjt. for the Plaintiffs. First, the bond does not require a stamp. That depends on 43 *G.* 3. *c.* 99. *s.* 13., 3 *G.* 4. *c.* 88., and 55 *G.* 3. *c.* 184. The latter statute exempts bonds given by collectors or their sureties, and excludes any doubt which might arise on the

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the other statutes requiring collectors' bonds given in respect of the assessed taxes to be taken in a certain amount. And even those other statutes contain no negative words which preclude the bond from being taken for something more (*a*). As to the objection that the bond has not been given to his majesty and his successors, in 3 *G.* 4. *c.* 88. there are provisions applying to the receiver-general, and to the collector; and by the provisions applicable to the collector, the bonds are not required to be given to his majesty.

Secondly, *Bigg* was a competent witness: he is liable to the Defendant, and therefore, does not relieve himself. It is alleged that his liability to the crown is preponderant, because, in addition to the sum deficient, he is liable to penalties. But he does not in terms contract any liability to the crown: his liability is to the receiver-general: 3 *G.* 4. *c.* 88. And he came to shew himself liable to the penalty. The general rule is, that the witness is competent if liable on both sides. An exception, indeed, has been made where, in addition, he is liable to costs on one side: *Jones* v. *Brooke* (*b*): But here the argument as to costs operates in favour of his competency, for his testimony goes to fix his liability to the Defendant's costs; and he is not called for the Defendant but for the Plaintiffs. It would lead, however, to great inconvenience to weigh with minuteness all the conflicting motives of a witness; the better course, therefore, is, to adhere to the rule in *Rex* v. *Bray*. (*c*)

Thirdly, the money has not been duly paid to the receiver-general; for though it has been received and paid in, it has been paid in to a year for which it ought not to have been paid. The language of the bond is, "that he shall *well* and *truly* pay, according to the intent of the acts." He has failed to do this, if he has not paid

(*a*) See *Collins* v. *Gwynne*, 7 *Bingh.* 423.

(*b*) 4 *Taunt.* 464.

(*c*) *Cas. temp. Hardw.* 358.

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to the service of the proper year. To insure payment to the proper service was the object of the bond. Suppose he had paid to the service of a year fifty years past, or to a wrong receiver? The receiver-general has no option, and cannot transfer from one account to another. An improper payment is equivalent to throwing the money away; in which case, the Defendant's responsibility could not be doubted. This is not a mistaken but a wrongful act, and it is for wrongful acts the surety is liable. It is not the duty of the receiver-general to see that every year is paid up before an ensuing year is received; and even if the receiver-general had neglected his duty, that would not discharge the surety. A payment made, *solvitur ad modum solventis*, particularly when, as here, an appropriation is made by the payer. By the 43 *G.* 3. *c.* 99. *s.* 48. the receiver-general is bound to give a receipt; the account is closed, and cannot be unravelled without great inconvenience. *Plomer* v. *Long* (*a*) shews the mode in which payments are to be applied.

Fourthly, if the receiver-general did not hasten, or the commissioners examine the collector, as found on the eleventh and eighth pleas, that is a matter for which they may be answerable, but it does not discharge the Defendant. The collector having been guilty of a breach of duty, it is no answer to say that others have neglected their duty also. The hastening by the receiver-general, and the examination by the commissioners, are not conditions precedent to the collector's paying; and the fault is not in the omission to collect, but in the paying to a wrong account. The commissioners, it is true, are the Plaintiffs, and it is objected that, having misconducted themselves, they ought not to call on the Defendant. But their duty was to examine the collector, not to go to the receiver's books and see that the payment was made

(*a*) 1 *Stark.* 153.

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to the right account; and the mere laches of the obligee does not discharge the obligor. *Trent Navigation Company* v. *Harley* (*a*), *Orme* v. *Young*. (*b*) It makes no difference that the question arises on a matter of public duty, unless the legislature or the bond make the enquiry of the receiver a condition precedent.

Fifthly, the thirteenth section of 43 *G.* 3. *c.* 99., does not impose as a condition precedent to the suit on the bond, that the collector's lands and goods shall all be seized; the commissioners have not put the bond in suit for more than the deficiency, and that is the object of the statute; otherwise, if the collector had lands to never so small an amount, the commissioners would be precluded from suing till the lands were sold, though the sale might never make up the deficiency. And the act only empowers, does not require them to seize. Besides, the jury have found that the commissioners had not notice of the collector's having lands.

Bompas Serjt. for the Defendant. The bond ought to have been stamped. The general exception in 55 *G.* 3. *c.* 184., must be construed with reference to the statutes which regulate the bonds to be exempted; and this bond is not a collector's bond under the statutes 43 *G.* 3. *c.* 99. *s.* 13., and 3 *G.* 4. *c.* 88., because it has not been taken in the form, and according to the regulations required by those statutes; particularly as to the amount of the penalty and the conditions annexed. (*c*)

Secondly, *Bigg* was not a competent witness, because he had a judgment against him at the suit of the crown; for 43 *G.* 3. *c.* 99. *s.* 41. enacts, that if monies in the hands of the collectors cannot be recovered under the warrant of the commissioners, or the commissioners shall neglect to issue such warrant, the amount shall be re-

(*a*) 10 *East*, 35.
(*b*) 1 *Holt*, *N. P. C.* 84.
(*c*) See 7 *Bingh.* 423.

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coverable as a debt upon record. And there is great difference between liability to mesne process and liability to actual judgment: the immediate liability preponderates over the remote; as with persons in possession of land or goods, who are incompetent witnesses to prove their own occupation or property. *Doe* v. *Bingham* (*a*); *Bland* v. *Ansley*. (*b*) So bail are not competent to give evidence for the Defendant, though they may recover over against him; their immediate interest being to get rid of the suit. And *Bigg*'s lands and chattels would be freed from any extent on the judgment of the crown by the judgment against the Defendant, and satisfaction entered on it. *Bigg* has also a preponderant interest against the Defendant in respect of liability to penalties and interest accruing thereon, under the statute 3 *G.* 4., which will be discharged by satisfaction on the judgment against the Defendant.

Thirdly and fourthly, The condition of the bond as to payment has been discharged by the conduct of the receiver-general and the commissioners. The condition referring to the statute, its effect is the same as if the regulations of the statute had been inserted in the condition; and those regulations have not been pursued by the commissioners, particularly as to the examination of the collector, and the order to pay, required by 3 *G.* 4. *c.* 88. regulations 3, 4. The performance of their duties by the commissioners is a condition precedent to the collector's paying the receiver; and the receiver-general was bound to examine the duplicates and certificates given by the collector, and to ascribe the payments to the right year. In *Farr* v. *Hollis* (*c*) the requisition of the magistrates to the collector of county rates to pay over the rates, was alleged as a condition precedent to the liability of a surety on a bond conditioned for due

(*a*) 4 *B.* & *Ald.* 672. (*b*) 2 *N. R.* 331. (*c*) 9 *B.* & *C.* 315.

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payment by the collector. The eighth and eleventh pleas, therefore, are sufficient, and an answer to the action, by shewing the neglect of conditions precedent.

Fifthly, The lands and goods of the collector ought to have been seized before this action was brought: the issue on the sixth plea is on the neglect to seize, not on the notice. But the commissioners cannot require to have notice: they are bound to enquire, and act upon their belief. In *Peppin* v. *Cooper* (*a*) it was assumed by the Judges that the omission to seize the goods of the collector who had made default, was a discharge of the bond. And there is no way in which the value of the land can be ascertained except by sale.

Taddy, in reply, was relieved from the objection as to the stamp. As to the competency of the witness *Bigg*, his liability cannot be compared to that of bail or tenant in possession, for both are, in some sort, parties to the cause, and their loss will be immediate. So in *Bland* v. *Ansley*, the execution which the action was brought to impeach, was an execution against the witness objected to, giving him therefore an immediate interest in the verdict. The present case is not of that nature; for though it is contended that the sum for which the witness would have shewn himself liable, becomes a debt on record, he is not released from that debt by a judgment against the surety, for the Court might still issue process against him, and reimburse the surety. And the judgment in this cause would not be evidence to discharge *Bigg* from any claim by the crown for interest accruing on penalties. As to the objection, that the collector is not bound to pay over till ordered to do so by the commissioners, the collector is bound to pay over to the receiver-general quarterly, whether he is ordered by the commissioners or not, and oftener if or-

(*a*) 2 *B.* & *Ald.* 431.

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dered by them. 3 *G.* 4. *c.* 88. Regulations 7. No. 1. Regulations, 3, 4.

The issue upon the seventh plea is in effect found for the Plaintiffs, and there is nothing in the fifth, sixth, seventh, eighth, or eleventh pleas, which can operate as a condition precedent to the putting this bond in suit for the deficiency. In *Peppin* v. *Cooper* the facts were altogether different from those in the present case; the question turned on the sale of the goods of a *surety* who was also a collector; and the language of the Judges must be taken with reference to that question. No doubt if lands are seized, they must be sold before the bond is put in suit, but it does not follow that the bond shall not be put in suit till every portion of land and item of furniture has been sold. To consider the sale a condition precedent to that extent, would be a construction of the act too inconvenient to be adopted. In *Farr* v. *Hollis*, the only question was, whether the requisition of the magistrates should have been alleged to have been made by an order of Court, and the case has no bearing upon the present. If the argument, that the neglect of the commissioners discharges the Defendant be ill founded, there is the less ground for the same argument in respect of the conduct of the receiver-general.

Cur. adv. vult.

TINDAL C. J. Upon this special case various objections have been taken on the part of the Defendant against the right of the Plaintiffs to recover on the bond stated in the declaration, whereof two are objections against the evidence offered and received at the trial of the cause. It is objected, in the first place, that the bond, not being stamped, was not producible in evidence; and secondly, that *Bigg*, the collector, was not an admissible witness upon those issues on which he was called as a witness by the Plaintiffs. As these objections go to the maintenance of the action generally,

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it may be advisable to take them first in order before we proceed to the rest.

The objection on the ground of the want of a stamp, rests on the argument, that this bond cannot be held to be within the exemption of the general stamp act, 55 *G.* 3. *c.* 184., "as a bond given by collectors of assessed taxes, and their sureties, for the due payment of monies collected by them, or otherwise relating to their officers," because it is not a bond given in conformity with the directions of the 43 *G.* 3. *c.* 99. *s.* 13., nor with those of 3 *G.* 4. *c.* 88. It is argued that the bond is not authorized by the former act, inasmuch as the penalty exceeds the amount of the duty assessed for the district; we think, however, the direction of the 13th section of that act, that the collector should give security to the commissioners "equal to the amount of the whole duty and sums of money assessed in, and to be collected in each district or place," is virtually complied with by a security given in such sum as is large enough to include, though it may exceed the exact amount of such duties. Such is the natural meaning of the words above referred to, and if any other meaning had been intended, we think the form of expression usually met with in acts of the legislature, of a sum "not exceeding the amount," &c. would not fail to have been employed. It is however further objected, that the bond ought to have been given to his Majesty, his heirs and successors, according to the 3 *G.* 4. *c.* 88. No. 1. of Rules and Regulations, art. 8.; and that the present bond not being made to the King, but to the commissioners, cannot be held to fall within the exemption of the preceding acts. But the whole of the rules and regulations comprised within No. 1. relate to the office of receiver-general; and the 8th clause, which is particularly relied on, appears to be confined to the cases of "bonds entered into with, or taken from the receiver-general, or with or from any other persons to be

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be appointed under that act, or their sureties, to remit the monies arising by the taxes granted by the said acts, or any of them, or any other duties under the management of the commissioners for the affairs of taxes;" an enactment which does not appear by any reasonable intendment to comprehend the case of a bond given by the collector and his security. By the former statute, the 43 *G.* 3., this bond had been expressly directed to be given to the commissioners, and there are no words in the rules and regulations No. 1., which at all import a repeal of the former statute in this respect, or indeed which relate to collectors' bonds at all. We therefore think the bond given in the present case to the commissioners, is a valid bond, and that it is exempted from the stamp duty, both by the general clause of exemption in 55 *G.* 3. *c.* 184., and also by the express enactment of the 43 *G.* 3. *c.* 99. *s.* 13.

The next objection taken at the trial was, to the competency of *Bigg* the collector, as a witness on the part of the Plaintiffs. As to which the objection shaped itself thus; first, it was said he had an immediate interest in the event of this suit, because, under the 43 *G.* 3. *c.* 99. *s.* 41., all the arrears of sums collected, which cannot be recovered under the warrant of the commissioners, are made recoverable as a debt upon record to the King. It was therefore contended, that a verdict and judgment against *Gwynne*, the surety in this action, would have the effect of removing the lands and goods of the witness from the process, or from the actual possession of the crown.

In the first place it is to be observed, that on the general question of his interest in the event of the suit, he, in fact, stands indifferent; for he is liable on his bond to the commissioners for the amount of the arrears, if this action should fail; and he is liable to the Defendant in precisely the same amount, if this action should succeed, and the Defendant pays the arrears. And, in answer to the particular shape which the objection now assumes,

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assumes, it appears to us that it is not the judgment against this Defendant, but the satisfaction of such judgment by the Defendant, which would have the effect contended for; because, notwithstanding the judgment against *Gwynne*, the process of the crown would still remain in force against the person, lands, and goods of *Bigg* until actual payment of the debt. The obtaining such judgment, therefore, is one step only towards such an effect; it is by no means the immediate, or even the necessary, cause of such a consequence. The witness, therefore, does not stand in the situation of the tenant in possession in ejectment, who cannot be called by the Defendant, because the witness is necessarily and immediately concerned in interest; for a verdict and judgment against the Defendant would, of necessity, and without any further step, be the means of removing the witness from his tenancy. In all the cases put in argument, the interest of the witness in the event of the suit is certain, immediate, and necessary; in this case, a judgment against the Defendant would not have any certain, immediate, or necessary effect on the interest of *Bigg*; on the contrary, it may never have any effect at all. But it was argued that *Bigg* was interested directly in the event of the suit, inasmuch as under No. 3. Rules and Regulations, 3 *G.* 4., he was liable to a penalty of 50*l.* if he did not pay in the money collected by him on a day ordered by the receiver-general, and a further penalty at the rate of 5 per cent. per annum for the whole sum by him detained. And it is contended that the witness is interested in proving what he was called to prove, that his payments were made in satisfaction of the earlier arrears, and not those of the last year of 1828, so as to avoid the penalty of further arrears of interest. But we think the judgment obtained against the Defendant on this point, by means of the evidence of *Bigg*, could not be made available by *Bigg* himself in his

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own favour, in case any subsequent action should be brought against him for the penalty of the arrears of interest: *Smith* v. *Prager*. (*a*) Such action, as it appears to us, would be decided upon the evidence produced by the crown as to the non-payment by him of the arrears on the day fixed by the receiver-general; and by any evidence on the part of the Defendant, other than the production of the judgment in this cause, of actual payment of such arrears either by himself or the surety. We therefore think the objection as to the competency of *Bigg* ought not to prevail.

As a verdict has been found for the Defendant upon the issues raised on the eighth and eleventh pleas, it will be more convenient to consider next, the objections raised by the Plaintiffs to the validity of those pleas: for unless those pleas are bad in law, so that the Plaintiffs are entitled to their judgment *non obstante veredicto*, the consideration of the further objections raised on the part of the Defendant would become unnecessary. The eighth plea states in effect, that the commissioners did not, at the times in the statute mentioned, call *Bigg* before them and examine him upon oath, and assure themselves of the sums paid to him as such collector, or make any order thereon for the payment of the sums to the receiver general; upon which allegation the Plaintiff takes issue in his replication. This plea is drawn upon the assumption that the compliance with the directions given to the commissioners by the thirty-ninth section 43 *G. 3. c.* 99., forms a condition precedent to the right of the commissioners to put the bond in suit. For unless these acts to be done by the commissioners form a condition precedent by the positive enactment of the statute, the Defendant cannot avail himself of the non-performance of acts not made a part

(*a*) 7 *T. R.* 60.

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of the condition of the bond itself. We are all of opinion, however, that the proper construction of that section is, to treat it as directory only; as containing a direction to the commissioners very useful in itself; having for its immediate object the further security of the revenue, by enabling the commissioners from time time to investigate the state of the collector's accounts, and to ascertain whether his payments keep pace with his receipts. The commissioners, therefore, in not obeying so useful a direction, may have made themselves responsible for carelessness and negligence. But to hold their compliance or non-compliance with the direction, a condition on which the bond was to be available or not, would, as it appears to us, exactly contravene the very object and design for which the provision itself was introduced, namely, the giving additional certainty and security for the payment over of the duties collected. But the argument on this plea has rested mainly upon the ground, that until the collector has been called before the commissioners and examined by them, and an order has been made, no time for the payment of the duties received by him can be held to have been fixed or appointed, and consequently no breach of the condition "for the payment by him upon the days and at the times by the said acts appointed for the payment thereof" can be held to have been incurred. Upon reference, however, to various parts of 49 *G.* 3. and the 3 *G.* 4., times for payment to the receiver may be fixed under the provisions therein contained, without any reference to and quite independent of the particular provisions on which the plea is framed, for investigating the state of the accounts, and for hastening the payment by the collector. See particularly forty-eighth section of 43 *G.* 3., the 3 *G.* 4. No. 1. Rules and Regulations, art. 7. And again, No. 2. Rules and Regulations, art. 2.; in all which cases payments are

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directed to be made at the office of the receipt of the receiver general, at times fixed for that purpose, quite independently of any previous examination by the commissioners or any order made thereon. The plea, therefore, neither shews by express averment that there was any *impossibility* to pay "upon the days and at the times by the said acts appointed for the payment thereof," nor does it state any facts inconsistent with the practicability of such payment being made. We therefore think the allegations in the plea do not amount to a discharge from the performance of the condition; but merely shew a neglect on the part of the commissioners to make the examination and issue the orders, if such in fact had become necessary.

The 11th plea states in substance, that although a large sum of money came to the hands of *Bigg*, yet the receiver-general did not call upon and hasten him to make payment of the same. It is unnecessary to state in detail the grounds upon which we hold this plea also to be insufficient as a legal bar to the action; as they are precisely the same in principle as those which have been just stated with respect to the 8th plea. We come, therefore, to the three remaining pleas, upon which points have been raised for our consideration.

The 2d plea is a plea of general performance, on which the Plaintiff has assigned for one of his breaches, "that *Bigg* had not duly paid over to the receiver-general the monies received by him as collector of the assessed taxes for the said division, in respect of the rates and assessments mentioned in the condition, *viz.* for the year 1828-9." This involves the main question between the parties, viz. whether the payment by *Bigg* to the receiver-general, of all the sums received by him for assessments for the year 1828-9, but the not paying in all these sums to the service of that year, but on the contrary, the paying in the sum of 693*l.*, part thereof

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expressly to the service of former years, during which he had been collector, was a satisfaction of the condition of the bond; and we think such payment is not "a duly paying over to the receiver-general," within the meaning of the condition. The two acts so often referred to evidently contemplate that the money raised by assessments in a given year shall be paid for the service of that year, and no other. Indeed, they are manifestly framed upon a supposition, that a new collector will be appointed for each succeeding year. If the receipts of a given year are not to be considered as appropriated to the service of the same year, it is obvious, that if any deficiency occurs on the part of the collector in the account with the receiver for the current year for which the duties have actually been collected, a second assessment must take place upon the inhabitants of the same parish or place, to make good such deficiency. If the collector has left the arrears of the former year unsatisfied, and attempts to make good such deficiency from the monies collected for the current year, the hardship is as great on the parish as if he had appropriated it for his own private purposes. And it is exactly to prevent the hardship cast upon the parish by the misappropriation of the collector, that the statutes direct a security to be taken upon his appointment. But as the Defendant would manifestly be answerable in case of the misappropriation of the duties, why should he not also in case of the wrongful payment of them to the receiver? It is argued, that it was the fault of the commissioners, or of the receiver, that the one had not made out the proper certificate and order for payment under 3 *G.* 4. *c.* 88., in which case the receiver could not have carried the money to any other than the proper account, and that the commissioners ought not to avail themselves of their own omission. It may be admitted that the commissioners had been negligent,

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but the non-compliance by them, or by the receiver, with the duties imposed upon them by the statute, cannot, on the other hand, excuse the collector for "the improperly paying," as the jury have expressly found that he did, the sum of 693*l.* which had been collected for the year 1828–9, to the service of former years. This "improper payment" is the voluntary act of the collector; for had he found the money expressly for the current year, the receiver-general could not have made the appropriation which is now complained of. The collector therefore appearing to us, by his own voluntary act, to have made a wrongful payment, we think the surety is liable for the amount of such payment, under the terms of the condition of the bond.

There remain only two other points reserved upon this case, viz. whether *Bigg* had lands which the commissioners could have seized and sold under 43 *G.* 3. *c.* 99. *s.* 52. And whether he had goods which they might have seized and sold. These questions arise upon the fifth, sixth, and seventh pleas; the fifth plea stating, that *Bigg* demanded and collected all the assessments, and that, from that time hitherto, he had lands, goods, and chattels within the jurisdiction of the commissioners, of which they had notice, and which ought to have been seized and sold by them, but which they neglected to do; the other two pleas stating the same in substance as to the *goods* of the collector. Now, the jury find specially upon the issues raised on these pleas, that *Bigg* had *lands* or houses after his alleged default, of the value of 121*l.*, which could have been seized and sold by the commissioners under the 43 *G.* 3. *c.* 99. *s.* 52.; and that he had goods after such default of the value of 200*l.*, which could have been seized and sold by the commissioners. But they further find that the commissioners had not notice that *Bigg* was possessed of any houses, lands, or goods at the time of his default,

but

but that they had reasonable grounds for believing that he possessed household goods at that time of the value of 200*l.*, which might have been seized and sold.

The Defendant contends, that under the proviso contained in the thirteenth section of the 43 *G.* 3., the sale of the lands and goods so found to belong to the collector must precede the commencement of the action against the surety; and relies upon the dictum of the Chief Justice of the King's Bench in giving his judgment in *Peppin* v. *Cooper* (*a*), as an authority for that proposition. That dictum, upon referring to the facts of the case then under judgment, appears to us scarcely to warrant the conclusion contended for; it appears, however, to us to be unnecessary to decide that point: for we all agree in opinion, that the sale of the collector's lands and goods can only form a condition precedent to the right to put the bond in suit against the surety, when the existence of such property of the collector is known to the commissioners at the time of commencing the action. A determination to the contrary would make it necessary for the commissioners to forbear so long to put the bond in suit, that all the benefit of it would, in many cases, be lost both against the collector and the surety. It is true, the necessity of notice to the commissioners is not expressly made part of the legislative enactment, but it is necessarily to be implied by the nature of the provision itself, which must have considered goods and chattels unknown to the commissioners as upon the same footing as if they had not existed.

As to the subsequent finding of the jury, "that the commissioners had reasonable grounds for believing that the collector had household goods;" such finding, neither by the rules of pleading, nor in the natural

(*a*) 2 *B.* & *Ald.* 431.

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meaning of the words themselves, can supply the want of actual notice or knowledge: it does not even amount to an assertion of actual belief in the commissioners. Upon the whole, therefore, we think the judgment must be entered for the Plaintiffs, with the assessment of damages to the amount of 693*l.*, upon the breach of the condition thirdly assigned in the replication.

Judgment for the Plaintiffs.

Jan. 17.

BARRATT *v.* PRICE.

Where a sheriff has illegally arrested a Defendant in one action, he cannot detain him in another.

THE question in this case was, whether the Defendant was entitled to be discharged out of custody in this action, he having been detained by the sheriffs of *London* under a *ca. sa.* issued at the suit of the Plaintiff, which had been lodged with them before the time of their arresting the Defendant upon mesne process issued at the suit of another plaintiff.

The arrest in the former action had been made by one *Richard Jackson*, the son and assistant of *William Jackson*, one of the serjeants at mace to the sheriffs of *London*. At the time of such arrest the warrant was held by *W. Jackson*, to whom it was directed, not by *Richard Jackson*; but after *Richard Jackson* had arrested the Defendant without any warrant, he delivered him into the custody of a police officer under a false charge of felony, and then brought his father to the police station, and the father, by handing the warrant over to the son, endeavoured by fraud to make the arrest appear to have been legal. On the ground of such fraud on the part of the sheriff's officer, and his son, one of the learned Judges, on an application made before him in

vacation,

vacation, ordered the Defendant to be discharged from that arrest. But the Defendant being detained under the *ca. sa.* issued by *Barratt*,

Wilde Serjt. obtained a rule *nisi* to discharge him from this detainer, on the ground that the apprehension by the sheriff in the former action being illegal, the same sheriff could not justify a subsequent detainer.

Bompas Serjt., who shewed cause, relied on *Howson* v. *Walker*, and *Crowden* v. *Walker* (*a*). There it appeared that one *Herne* had got over some pales, and thrown up the sash of the defendant's window, to get into the house, and afterwards broke open an inner door, in order to arrest him; and all this without any warrant directed to himself; and accordingly did arrest the defendant at the suit of *Howson*. The plaintiff's attorney being sent for, and finding *Herne*'s mistake and irregularity, sent for one *William Howse*, to whom the warrant was really directed, and gave him charge of the defendant; and *Howse* having another writ against him at the suit of *Crowden*, carried him to *Aylesbury* gaol, and charged him with *both* these actions. Upon a motion to discharge the defendant out of custody, in both actions, and for an attachment against *Herne*, it was held by the Court that a defendant illegally in custody at the suit of one plaintiff, was not privileged from arrest at the suit of another, unless there were some collusion. *Bompas* therefore contended that though an arrest be illegal, a subsequent detainer in another action is justified, except in the case of a party privileged from arrest; and referred also to *Spence* v. *Stuart* (*b*), *Davies* v. *Chippendale* (*c*), *Barclay and Others* v. *Faber* (*d*), and the authorities collected in 1 *Chitt. Rep.* 579.

(*a*) 2 *W. Blk.* 823.
(*b*) 3 *East*, 89.
(*c*) 2 *B. & P.* 282. 367.
(*d*) 2 *B. & Ald.* 743.

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Wilde. The principle to be deduced from all the cases is, that if the sheriff be no party to the illegal apprehension, he may justify a subsequent detainer for a legal claim; but if he be either party or privy to the illegal apprehension, he cannot justify a subsequent detainer. In *Howson* v. *Walker* the sheriff's officer who detained the defendant was entirely unconnected with *Herne*, who arrested him, and was not privy to the arrest. In all the other cases referred to, either the apprehension was legal at the outset, and set aside for some collateral matter, or if illegal, the sheriff who detained was not connected with the sheriff who arrested. But in *Birch* v. *Prodger* (*a*), where an attachment for non-payment of money to *A.* having been issued against *B.* from the Court of Common Pleas, and the process being in the hands of an officer, who had not been able to serve *B.* therewith, *B.* was met by *A.* in the street, and carried by violence to the chambers of *C.*, who was *A.*'s attorney, and there detained while the original process was sent for and served upon him; the officer also was sent for (but not by *A.*); and on *B.*'s leaving the chambers of *C.* he was arrested; the Court held, that that arrest was illegal, and discharged *B.*

Cur. adv. vult.

TINDAL C. J., after stating the facts as *antè*, p. 566., proceeded, —

The question now arises, Whether the same sheriffs can legally detain the Defendant in custody under another writ which they held against him at the time of such illegal arrest? And we are of opinion that they cannot; and the ground on which this opinion is formed, is shortly this, — that the first arrest was illegal by the wrongful act of the sheriff himself. In two of the cases

(*a*) 1 *N. R.* 135.

cited

cited on the part of the Plaintiff, viz. *Davies* v. *Chippendale*, and *Barclay and Others* v. *Faber*, it was held, that although the defendant was entitled to his discharge out of custody upon the original arrest at the suit of *A.*, he was not entitled to be discharged also from a detainer subsequently lodged with the same sheriff against him by *B.*, whilst in custody under the former writ. But in both those cases the arrest was not *an illegal act on the part of the sheriff:* in each case the sheriff had acted in strict conformity with his duty in obeying the writ, though upon objections taken to the affidavit under which the defendant had been held to bail in the action at the suit of *A.*, the Court thought him entitled to his discharge. Those cases we think will not govern the present, where the party is under an illegal imprisonment by the act of the sheriff's officer, that is, for this purpose by the act of the sheriff himself. But the Plaintiff relies on the case of *Howson* v. *Walker* (*a*), as decisive in his favour. Upon looking, however, at the facts of that case, we think it is distinguishable from the present. In that case *Herne*, who broke into the house, and made the arrest, does not appear to have been connected with the sheriff's officer who held the warrant and afterwards made the arrest under it. In the first place no warrant whatever had been made out to *Herne*. Again, when *Howse*, the sheriff's officer to whom the warrant in that action was directed, heard of the transaction, he went to the Defendant, and having another warrant also against him at the suit of *Crowden*, carried him to gaol, and charged him with *both* those actions. The sheriff's officer, therefore, did nothing to identify himself with *Herne*. The illegal arrest of the Defendant by *Herne*, was no act of the officer or the sheriff, but the act of a stranger; the taking the De-

(*a*) 2 *W. Blk.* 823.

fendant

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fendant to prison and charging him in the action at the suit of *Crowden*, was in fact a new arrest, rather than a detainer; and there was no more objection to the sheriff's arresting the Defendant in this second action, because at the time he found him he was illegally imprisoned, than if he had found him at large.

The principle to be derived from the cases appears to be, that where the sheriff arrests the Defendant in one action, it operates virtually as an arrest in all the actions in which the sheriff holds writs against him at the time: for it would be only an idle and useless ceremony to arrest the Defendant in the rest; it would be "*actum agere:*" and this detainer will hold good, though the Court may, upon collateral grounds unconnected with the act of the sheriff, order the party to be discharged from the first arrest. But where the sheriff has by his own act illegally arrested the Defendant, the Defendant is not in custody under the first writ, he is suffering a false imprisonment; and such false imprisonment being no arrest in the original action, cannot operate as an arrest under the other writs lodged with the sheriff.

We therefore think this rule must be made absolute.

Rule absolute.

Jan. 17.

TAYLOR *v.* Lady GORDON.

Costs of an arbitration under an order of *Nisi Prius*, are not *costs in the cause.*

THIS was an action brought by the Plaintiff against the Defendant, his late landlady, to recover from her the value of certain buildings, fixtures, and tenant-rights, alleged to be due to him as outgoing tenant of a farm at *Linwood* and *Market Rason*, according to the custom of the country where the farm lands and premises were

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were situate, and for land-tax and other demands of the Plaintiff. A set-off was pleaded by the Defendant for 548*l.* 10*s.*, and a sum of 300*l.* was paid into court.

At the trial before *Bayley* B. last Spring assizes for the county of *Lincoln*, it was agreed to take the opinion of the jury as to whether there was a custom beyond the common law with respect to buildings and fixtures; and whether there was a custom to allow an outgoing tenant one whole year's rent and rates of the land summer fallowed by him the year previous to his quitting. The jury found in favour of the latter and against the former custom, except as to buildings five or six inches in the ground, and crow fencing, which the jury thought a tenant had a right to remove. And then, by an order of *nisi prius*, a verdict for 500*l.* was taken for the Plaintiff, subject to the award of a barrister, who was to order for what sum the verdict should be finally entered, and assess the damages between the parties, and was to enquire into several special matters relating to buildings, fixtures, &c., to which the Plaintiff might lay claim at common law, or under the custom found by the jury. If either party, by affected delay or otherwise, prevented the arbitrator from proceeding, he was to pay such costs as the Court should think reasonable. In other respects, the order of *nisi prius* was silent on the subject of costs. The award was to be ready by the first day of the then next *Trinity* term.

The arbitrator, after reciting in his award the order of *nisi prius*, awarded to the Plaintiff a sum beyond the sum paid into Court, and directed that each party should pay his own costs of the arbitration, and the expence of the award equally between them. Upon taxation of costs, the prothonotary having, notwithstanding the terms of the award, allowed the Plaintiff his costs of the arbitration,

Wilde

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Wilde Serjt. obtained a rule *nisi* for a review of the taxation, upon the ground that the Plaintiff, under the order of *nisi prius*, was entitled to his costs in the *cause* only, and not to his costs occasioned by the reference, in awarding which the arbitrator had exceeded his authority.

Objection was also made to a charge for the attendance of one *Smith*, at the assizes, as a witness for the Plaintiff, it being alleged that he was there in his capacity of attorney, conducting another cause. This, however, was denied by *Smith*.

Taddy Serjt., who opposed the rule, contended, that upon a reference by order of *nisi prius*, the costs of the reference are costs in the cause, the referee standing in the place, and discharging the functions of the jury. He relied on *Tregoning* v. *Attenborough* (*a*), where, in trover a verdict was taken for Plaintiff to the full amount of the goods converted, the Plaintiff consenting to take them back in reduction of damages, upon its being referred to an arbitrator by order of *nisi prius*, to ascertain the amount of deterioration, which amount, with the costs in the cause, were to be paid to Plaintiff; and it was held, that the expence of witnesses attending the arbitration were costs in the cause. The same principle was acted on in *Mackintosh* v. *Blyth* (*b*).

Wilde. In *Mackintosh* v. *Blyth*, the referee merely certified the amount of the verdict, and made no formal award; he might, therefore, be considered to supply the place of the jury, and the costs incurred before him to be costs incurred before the jury. In *Tregoning* v. *Attenborough*, the reference was exclusively in ease of the Defendant, for without it the Plaintiff might have

(*a*) 7 *Bingh.* 733. (*b*) 1 *Bingh.* 269.

taken

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taken out execution for the full amount of the goods converted; but he consented to take instead, the goods themselves, and what should be found to be the amount of the damage done to them by the Defendant. The Defendant, therefore, impliedly undertook to defray the expence of that investigation. But in the present case, the arbitrator was to enquire into several matters collateral to the cause, upon which the parties might respectively have conflicting rights; as fixtures, the custom of the country, and the like. The costs of such an enquiry could not be called costs in the cause.

Cur. adv. vult.

TINDAL C. J. We agree in opinion that the prothonotary should review the taxation of costs in this case. The general rule in cases of reference is this, that where the order of *nisi prius* is silent upon the subject of the costs of the reference and award, the arbitrator has no authority to adjudicate upon them, but each party must bear his own expences and the half of the award. The case of *Tregoning* v. *Attenborough* (*a*), is distinguishable from the present. There the reference of the amount of the deterioration of the goods which the Defendant had undertaken to deliver up, was consented to entirely and exclusively for the benefit of the Defendant. If such reference had not taken place, the Plaintiff might have taken out execution for the whole of the damages recovered by the verdict. The expences therefore of such investigation were strictly and properly within the meaning of the parties' expences in the cause, because the amount of the verdict of the jury was to be ascertained by such finding of the arbitrator. But here a very large field of enquiry was opened before the arbitrator, quite independent of the question at issue in the

(*a*) *7 Bingh.* 733.

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cause. The parties have made a bargain with each other, consisting of many particulars, in which there is no mention of costs of the reference to be given by the arbitrator. On the contrary, the parties expressly stipulate, that if there is any wilful delay, either party shall pay such costs, not as the arbitrator, but as the Court shall direct. We think, therefore, that in this particular case, the costs of the reference do not follow the costs of the cause, but each party must bear his own costs, and half the award.

As to the objection taken to the allowance of Mr. *Smith*'s costs and expences, the prothonotary will at the same time, take into his consideration whether *Smith* attended at the assizes merely as a witness in this cause, or on any other account at the same time, and make the proper allowance under the circumstances.

Rule absolute.

Jan. 17.

SMALL and Others *v.* MOATES.

A lien on the lading of a ship having been expressly reserved to the owner by a charterparty, held that goods which the charterer purchased and put on board, and then transferred with a stipulation to convey them to their destination for a certain amount of freight, were, even as against an indorsee of the bill of lading, subject not only to that freight, but to the shipowner's lien for a balance due to him under the charterparty, whether possession of the ship was by the charterparty completely out of the shipowner and vested in the charterer, or not.

THIS was an issue directed by the Court of Chancery, to try whether the Plaintiffs, as indorsees of the bills of lading of certain rice and saltpetre, were at the time of the arrival of the ship *York* in the port of *London*, entitled to have from the Defendant, as owner of the said ship, the possession of said rice and saltpetre, on payment of reasonable freight for the carriage thereof from *Calcutta*. The Plaintiffs maintained the affirmative

of

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of such issue. At the trial before *Tindal* C. J., *London* sittings after *Trinity* term, 1831, a verdict was found for the Plaintiffs, subject to the opinion of this Court upon the following case:—

The Plaintiffs were merchants in *London*, and the Defendant was, during the voyage, hereafter mentioned, owner of the ship *York*. In the month of *March* 1827, a charter-party was entered into between the Defendant of the one part, and *Henry Richard Wilkinson*, mariner, freighter of the said ship, of the other part, by which the said owner, for the considerations thereinafter mentioned, agreed with the said *H. R. Wilkinson* that he the said *H. R. Wilkinson* should be and he was thereby accordingly appointed to the command of the said ship for and during the voyage and service thereinafter expressed; and that the said ship should be found at the expense of the owner, with all stores, &c.; and that the said ship being so found, *Wilkinson* should be at liberty to load on board her in the port of *London* all such lawful goods as he might think fit, &c.; and should set sail and proceed with the same to such port or ports in the *East Indies* as he might think fit, and there unload and reload all such lawful goods, &c. as he might think proper, and finally return to the port of *London*, when and where the said intended voyage and service was to end and be completed: the ship during the voyage was to be kept tight, &c., at the expense of the owner, who was to appoint one mate on board for and during the said intended voyage and service: in consideration whereof, and of every thing above mentioned, *Wilkinson* agreed to *accept, receive, and take the said ship into his service* for a voyage from *London* to the *East Indies* and back to the port of *London*, and to take upon himself the command of the said ship, and navigate her to the best and utmost of his power, skill, and

 ability;

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ability; to take care of her for the owner; and that the said ship should be and remain in the service of him *Wilkinson* for the space of twelve calendar months certain, to be accounted from the day the ship should be ready to receive a cargo on board in the port of *London*, and to continue until her return to and being finally cleared inwards by his Majesty's officers at the same port of *London*: and further, that *Wilkinson*, his executors, or administrators, should pay, or cause to be paid unto the said owner, his executors, administrators, or assigns, freight *for the use or hire* of the said ship, at and after the rate of 12*s.* sterling per ton, register measurement, per calendar month, for and during the aforesaid space of twelve calendar months certain, to commence and be accounted as above mentioned; and at and after the like rate for all such further time (if any) as might be necessary to complete the said intended voyage, and until the return of the said ship to and being finally discharged in the port of *London* as above mentioned, or up to the day of her being lost, captured, condemned, or last seen, or heard of: such freight to be paid in manner following, that is to say, the sum of 1500*l.* part thereof in cash on the day the said ship should be cleared outwards at the custom house in *London* on her said intended voyage; the sum of 1500*l.* further part thereof on the day the said ship should be reported inwards at the same custom house, by approved bill or bills payable at two months' date from that period; and the residue and remainder upon the final disharge of the said ship from her said intended service by the like bill or bills payable at two months' date from that period. *Wilkinson* further agreed to pay and defray all port charges, tonnage, dock dues, pilotage, and other charges that might attach to the said ship during her said intended service, and likewise to

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to find and provide a proper and sufficient crew of officers and men and boys to navigate and manage the said ship, and pay and defray the wages of such crew, and also furnish and provide at his own expense all provisions and other necessaries for such crew during the said intended voyage and service, together with all coals, firewood, or other fuel, water, and all extra water-casks and dunnage, for the cargoes; and that upon the final discharge of the said ship in the port of *London*, he would well and truly deliver up unto the said owner, his executors, administrators, or assigns, the said ship, her boats, oars, stores, tackle, apparel, and furniture, agreeably to an inventory which should be made thereof previous to her sailing from the port of *London*, reasonable use, wear and tear excepted, together with her certificate of registry, and all other papers, vouchers, and documents in anywise belonging or relating thereto. Fifteen days to be allowed for repairs in case of accident; such repairs to be completed in the least possible time; *Wilkinson* thereby undertaking to act abroad in all such cases as the agent of the said owner and for his benefit, and to forward every necessary document to the said owner to enable him to recover any claim he might have on the underwriters of the said ship during her said intended voyage; to save harmless and keep indemnified the said owner and all other owners of the said ship and his or their respective executors, administrators, and assigns, from all claims and demands whatsoever for wages as well of him *Wilkinson* as master or commander of the said ship, or of any other person acting as master thereof, as of any of the officers or crew of the said ship for and during the whole of the said intended voyage and service; and also from all claims, penalties, and forfeitures to which the owners of the said ship might in any manner become liable in consequence

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of any illegal act or acts to be done or committed by the commander, officers, or crew of the said ship during the said intended voyage. And lastly, it was expressly agreed and understood by and between the said parties thereto, that the right of ownership of the said ship should, during the continuance of the charter-party, remain firmly and be fully vested in the said owner, his executors, administrators, and assigns, *and that he and they should at all times during the said intended voyage and service have a full and complete lien upon the loading of the said ship* as well for all losses and damages which the said owner, his executors, administrators, or assigns might sustain or be put to in consequence of the non-payment of any of the bill or bills to be given for freight as thereinbefore mentioned, as *for all arrears of freight to become due under and by virtue of those presents*, and for seamen's wages, port dues, dock charges, bills drawn by the master, or other sums which ought to have been paid by *Wilkinson*, but which the said owner might have been called on for and been obliged to pay; and that the said owner, his executors, administrators, or assigns should have full power and authority to hold and retain the said goods until full payment, re-imbursement and satisfaction of all such losses, charges, damages, and arrears of freight, and other sums paid for or on account of *Wilkinson*, and which he of right ought to bear, pay, and sustain agreeably to the tenor, true intent and meaning, of the charter-party. And to the true performance of all and every the promises and agreements therein contained, on the part and behalf of the said parties respectively, they bound themselves their heirs, executors, and administrators, each unto the other of them (especially the said owner, the said ship or vessel her freight and appurtenances, and the said freighter, the goods

goods to be laden in her,) in the sum of 3000*l.* of lawful money, firmly by those presents. In witness whereof, &c.

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The ship sailed upon the voyage in the *East India* private trade, with *Wilkinson* as master and commander, and arrived at *Calcutta* on the 26th of *December*, 1827. The outward cargo being discharged, *Wilkinson* endeavoured to procure a homeward cargo: he shipped on freight to a large amount, but could not get a sufficient quantity to complete his cargo; and in *January*, 1828, he purchased the rice and saltpetre in question as dead weight, and paid for them in bills at two months' sight. When the bills were nearly due *Wilkinson* had no funds to meet them, and apprehending that he or the ship might be detained by process from the Supreme Court if the bills were not paid when due, to enable him to pay for the goods he applied to and agreed with Messrs. *Boyd*, *Beeby*, and Co. merchants at *Calcutta*, for an advance of 800*l.* upon the security of the said rice and saltpetre. In pursuance of that agreement, *Wilkinson* made and indorsed the following bills of lading, and delivered the same to *Boyd*, *Beeby*, and Co. "Shipped by the grace of God in good order and well conditioned by *H. R. Wilkinson*, in and upon the good ship called the *York*, whereof is master, under God, for this present voyage, *H. R. Wilkinson*, now riding at anchor in the *Hoogly*, and by God's grace bound for *London*, to say, one thousand and fifty bags of rice, two hundred bags of saltpetre, being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned at the aforesaid port of *London*, the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever, excepted, unto order, or to assigns, he or

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they paying freight for the said goods at 1*s.* 6*d.* per ton of twenty cwt., with average accustomed. Dated in *Calcutta*, 18th of *March* 1828, *Henry R. Wilkinson.*"

In further pursuance of the said agreement, *Boyd, Beeby*, and Co. advanced to *Wilkinson* the sum of 800*l.* upon the aforesaid security (which was applied in discharge of the bills he had so given for the rice and saltpetre), and *Wilkinson* handed to *Boyd, Beeby*, and Co. a bill of exchange for 800*l.*, dated *Calcutta*, 18th of *March* 1828, drawn by *Wilkinson* on *Small* and Co. of *London*, and payable at six months' sight.

Boyd, Beeby, and Co. likewise paid 36*l.* for premiums of insurance on the said goods from *Calcutta* to *London*, for the repayment of which, they, by the direction of *Wilkinson*, drew upon the Plaintiffs a bill for that amount.

Boyd, Beeby, and Co., in the usual course of business, indorsed and transmitted the said bills of lading to the Plaintiffs as a security for the re-payment of the amount for which the said bills of exchange were drawn upon them. The Plaintiffs paid the two said bills of exchange, when due, upon the security of the bills of lading aforesaid.

Wilkinson could not have got the money if he had subjected the goods to any higher freight. He himself made the offer to the house of *Boyd, Beeby*, and Co. that those goods should be shipped at that low freight, it being unusual for merchants or other persons than shipowners, to ship rice, because it rarely pays more than the freight.

The ship arrived in the *East India* Docks the 16th of *September* 1828, and the rice and saltpetre were landed and lodged in the custody of the *East India* Company, and were sold by them with the consent of all parties, and without prejudice, for 1157*l.* 11*s.* 5*d.*

On

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On the 25th of *September*, 1828, a commission of bankrupt issued against *Wilkinson*, under which he was found and declared a bankrupt.

Wilkinson was indebted to the Defendant for freight under the charter-party - - - -	£980	3	9
And the Defendant paid for seamen's wages and other charges - -	768	4	11
Total	£1748	8	8

The question for the opinion of the Court was, whether the Plaintiffs, upon payment of reasonable freight in respect of those goods, were entitled to the possession of them as *bonâ fide* indorsees for value of the bills of lading: or, whether the Defendant, as owner, had any lien in respect of the whole monies due under the charter-party, which must prevail against the Plaintiffs' claim: and a verdict for the Plaintiffs or the Defendant was to be entered accordingly. The case was argued last *Trinity* term, by

Coleridge Serjt. for the Plaintiffs. Whatever rights the shipowner may have, under this charter-party, against goods which are the property of the charterer, the indorsee of this bill of lading ought not to be deprived of the rights he acquires under it by any special clause of lien in a charter-party, of which he can have had no notice. The party to whom freight is due appears on the bill of lading; so that the owner or indorsee of the bill is entitled to receive the goods upon proof of payment of the freight, even though the bills have been erroneously signed as for freight paid. *Howard* v. *Tucker*. (*a*) Independently of the special clause, the

(*a*) 1 *B.* & *Adol.* 713.

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right of the shipowner to detain goods for freight is his lien, arising from legal implication.

There can be no lien, however, without possession, and upon this charter-party it appears that the possession of the vessel passed out of *Moates* to *Wilkinson*. For the Court does not rely upon a single expression, but looks to the effect of the whole instrument. *Wilkinson* fills the double situation of captain and charterer. He is called the freighter — is to load a cargo on board — to find pay and provision for the crew — to take the ship into his service, and to pay freight by time, not for goods, but for the use and hire of the vessel by measurement: he is to pay all port and other charges, and after the voyage to deliver up the ship. And notwithstanding the clause that the right of ownership and lien shall remain in *Moates*, the construction of the charter-party must turn upon the intention to be collected from the whole instrument. In *Hutton* v. *Bragg* (*a*) a part of the ship was reserved to the master, who, as well as the crew, was appointed by and paid at the expense of the owner; and yet because the whole object of the voyage was for the use of the charterer, he was held owner for the time. *Tate* v. *Meek* (*b*) was not decided so much upon the fact of possession as upon the circumstance that, independently of the charterer's possession, the owner was to have a lien, and the shipper of goods was to pay freight on the delivery of the goods *as per charter-party*, which affected him with notice of the charter-party. *Yates* v. *Railston* and *Yates* v. *Meynell* (*c*) were decided on the same ground. In *Christie* v. *Lewis* (*d*) it was held that the possession did not pass: *Dallas* C. J. *dissentiente*. But there the master was to receive and deliver the goods, and the ship was navigated at the

(*a*) 2 *Marsh.* 339.
(*b*) 8 *Taunt.* 280.
(*c*) 8 *Taunt.* 293.
(*d*) 2 *B.* & *B.* 410.

owner's

owner's expense. Here *Wilkinson* covenants to take and deliver the ship, and to defray the expense of the navigation; and the stipulation that the right of ownership shall remain in *Moates* cannot contravene the effect of the whole instrument, with which it is wholly incompatible; as, "*let to hire*" was, with the effect of the instrument in *Christie* v. *Lewis*.

In *Abbott on Shipping*, 191. it is laid down: "Although the ship and freight are by the terms of a charter-party expressed to be bound to the performance of the covenants on the part of the owners or master, and this is conformable to the maritime law; yet, as I have before observed, there does not appear at present any mode of obtaining in this country the benefit of the security of the ship itself in specie for the performance of such a contract made here. It seems also that the operation of such a clause, as a lien on the cargo, must be restrained to enforcing the payment or security of sums capable of being ascertained by computation, and which are, according to the terms of the instrument, properly payable in some form on the delivery of the goods, and that it is not to be applied to the breach of a covenant, which gives an action for unsettled damages, as a covenant to furnish a full lading. It has been held that the master could not detain the cargo for the breach of a covenant to furnish a full lading, nor for demurrage, in a case where the charter-party did not contain this clause; and nothing was said in argument as to the omission of it. Neither can the owners in all cases have the full benefit of this clause as giving a lien on the cargo for the payment of what is usually denominated freight." And he cites *Paul* v. *Birch* (*a*), where two persons, who were factors, hired a ship of one *Paul* at the rate of 48*l.* per month, and exe-

(*a*) 2 *Atk.* 621.

cuted

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cuted a charter-party, by which the goods to be put on board were made liable to him, and they had power to appoint the master and mariners. Some merchants in the *West Indies* loaded the ship with goods, and allowed the factors 9*l.* per *ton* for the carriage. The factors who had thus chartered the ship in their own name, became bankrupts: *Paul* instituted a suit in the Court of Chancery to compel the merchants to pay him for the hire of the ship, insisting that they were liable to do so by reason of this clause in the charter-party. But Lord Chancellor *Hardwicke* decided that he should recover of them no more than they had engaged to pay the factors for the freight, and that they were not liable to make up the deficiency to him. His Lordship observed, that by the general law the cargo is liable to pay the freight, but that in this case the 48*l.* per month was improperly termed the freight of the goods, being rather the hire of the ship; that the factors had made an agreement with the master on their own account, and not on the part of the merchants, and therefore the merchants were not liable; otherwise they would be in the hardest case imaginable, for they would be liable to any private agreement between the occupier of a ship and the original owners of it. "A person," said his Lordship, "that lets out a ship to hire ought to take care that the hirer is a substantial man; it is his business to look into this; and if the persons who hire are not competent, the master must suffer for his neglect. Whatever hardship, therefore, there may be on the one hand to the person who lets out to hire, the hardship is much greater on the other side; and what gives additional weight to the merchants' case is the great convenience this gives to trade in general."

In *Mitchell* v. *Scaife* (*a*) a ship was chartered for a

(*a*) 4 *Campb.* 298.

particular

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particular voyage for a gross sum by way of freight. The captain signed bills of lading for the cargo, (which was the property of and consigned to a third person,) specifying a rate of freight amounting to a less sum than that mentioned in the charter-party. It was held that the ship-owner had no lien on the cargo beyond the freight specified in the bill of lading. In *Watson* v. *Rawson*, under similar circumstances, (*N. P.*, *coram* Lord *Tenterden*, *Feb.* 1831.) the claim for freight was in like manner limited to the amount due upon the bills of lading. Nothing but the special clause distinguishes this case from that and the preceding. But the general law cannot be restrained, as to third persons, by an agreement between owner and charterer, otherwise there is an end of the transfer of bills of lading by indorsement.

Taddy Serjt., *contrà*. The special clause is compatible with the rest of the instrument, and sufficiently distinguishes this from the cases cited: in all of them the only question was as to the existence of the right of lien; but no such question can arise here, because it is specially reserved to the ship-owner. *Christie* v. *Lewis* turned on the words *let and take to hire*, the absence of which had been adverted to in *Saville* v. *Campion* (*a*). In that case (1819, — *Scaife* v. *Mitchell* was in 1815 —), by charter-party it was covenanted, that the owner should receive on board, in *London*, all such goods as the freighter thought fit to load, and should proceed therewith to *Madras*, and there, after delivering his outward cargo, receive from the freighter's agents a homeward cargo, and deliver the same in *London*; and that all the cabins, but one, which was reserved for the use of the captain, should be at the disposal of the freighter, who was to

(*a*) 2 *B.* & *Ald.* 503.

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appoint a supercargo to superintend the stowage of the goods. Freight was to be paid at so much per ton on the register tonnage of the ship. The captain and crew were paid by the owner. It was held that, there being no express words of demise of the ship itself in the charter-party, the freighter did not thereby become the owner for the voyage; but that the possession continued in the owner, and that he, therefore, had a lien upon the cargo for his freight. In *Faith* v. *East India Company* (*a*), by a charter-party, freight was agreed to be paid for the use or hire of the ship at a certain rate per ton, for a voyage out and home, in manner following, viz. a certain sum in advance on the ship's clearing outwards, and the residue half in cash and half in approved bills, upon the delivery of the homeward cargo; the owner also appointed *C. S.* master, at the request of the charterer, who executed a bond, conditioned for the faithful performance of the master's duty; and the owner expressly instructed *C. S.* to be careful to sign all bills of lading with the clause, "freight payable as by charter-party:" the ship was consigned to *C.* and Co., in *Calcutta*, by whom she was put up, for her homeward voyage, as a general ship, and different merchants shipped goods by her, *C.* and Co. taking for homeward freight bills payable sixty days after delivery of the cargo; and a new master having been appointed by *C.* and Co., in conjunction with *C. S.*, signed bills of lading with the clause, "paying freight agreeable to freight-bill:" the freight bills were made payable in *London* to *B.* and Co., to whom the charterer was indebted for advances on the outward cargo, and who, as well as *C.* and Co., were cognizant of the terms of the charter-party; and it was held, that the owner of the ship had a lien on those goods to the extent of the homeward

(*a*) 4 *B.* & *Ald.* 630.

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freight. And, *per Abbott* C.J. "As to the sub-freighters, who are wholly unconnected with the charterer, it is quite immaterial to whom they pay the freight due for the conveyance of their goods; and as to the goods shipped by *C.* and Co., they must either stand in the same situation as those of the other freighters, or, if considered as the goods of charterer and master, must be liable to pay the freight as per charter-party."

Then, if such be the construction of the charter-party from *Moates*, the indorsement of the bills of lading makes no difference. In *Watson* v. *Rawson*, Lord *Tenterden* may have thought the owner of the goods was exempt by a previous contract. In *Christie* v. *Lewis*, *Burrough* J. says: "It has been urged, that the persons who put the goods on board at *Demerara* (on which this freight arose), were strangers to the charter-party. In answer to this, I am of opinion, that they cannot be so considered: for the goods to be shipped at *Demerara*, were, by the charter, to be such as the freighter or his agents should send. The shipper of these goods, therefore, must be taken to have acted under the authority of the freighter, and must be deemed to have notice of the charter-party and its contents." And *Richardson* J. said, "By the law of *England* and all commercial countries, the owner of a ship has a lien on the cargo for his freight; and this doctrine is laid down in many well known books of authority. Agreements may, undoubtedly, be entered into by which the owner may consent to relinquish this right, but the mere circumstance of his entering into an agreement, touching the mode in which he shall be paid for freight, will not, of itself, divest him of his right to lien; that can only be excluded by express terms." The shippers here should have enquired for the charter-party. If they omit to do so, they come in under the charter-party, and their rights are not higher than the charterer's.

Coleridge,

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Coleridge, in reply. The object of the special clause is, to give *Moates* a lien for those charges for which he would have been liable if he had been in possession: as port charges, pilotage, and the like: that is, in case *Wilkinson* should fail to pay them, pursuant to his contract. In *Savile* v. *Campion*, Lord *Tenterden* examines the charter-party clause by clause, and sums up: "So that there is not any one act to be done on board the ship by the freighter or his agents, except the stowage of the goods, which is specially provided for; and this special provision, as well as the clause relating to the cabins, would be unnecessary, if it had been intended that the freighter should have possession of the ship; because, in that event, he might stow and place goods and persons as and where he himself should choose, unless restrained by some special contract on his part." *Mitchell* v. *Scaife* is recognised in 1821, in *Faith* v. *East India Company*, in which case, all parties were connusant of the terms of the contract. And though *Wilkinson* might have no right to claim the goods in question exempt from lien, it does not follow that he may not confer a clear title on another. In *Watson* v. *Rawson*, Lord *Tenterden* did not decide on the ground of any previous contract.

Cur. adv. vult.

TINDAL C. J. The question stated upon the pleadings in this issue is, "Whether the Plaintiffs as indorsees of certain bills of lading of certain rice and saltpetre which had been shipped by one *Henry Richard Wilkinson* on on board the *York*, in the river *Hoogly*, at *Calcutta*, and conveyed therein to the port at *London*, were, at the time of the arrival of the said ship in the port of *London*, entitled to demand and have from the said Defendant as owner of the said ship the possession of the said goods and merchandize upon payment or tender to the said Defendan t

Defendant, as such owner, of certain reasonable freight for the carriage and conveyance of such goods and merchandize from *Calcutta* to *London*." And after consideration of the facts stated in the special case, as also of the arguments urged before us on the part both of the Plaintiffs and the Defendant, we are of opinion that the Plaintiffs are not entitled to the possession of the rice and saltpetre, on the payment of reasonable freight for the carriage and conveyance of the same from *Calcutta* to *London*, but that the Defendant, the owner of the ship, is entitled to retain the same for the whole of the freight and other payments due to him, under the express reservation contained in the charter-party.

Whether upon the proper construction of the charter-party under which this vessel sailed, the possession of the vessel was completely taken out of the Defendant and vested for the time in the master, who was also the charterer of the vessel, as contended on the part of the Plaintiffs; or whether, as contended on the part of the Defendant, the possession of the master, notwithstanding his being also the charterer, and notwithstanding the peculiar terms of the charter-party, still continued to be the possession of the ship-owner; would have been a question which must of necessity have been determined by us in order to decide the right of lien set up on the part of the Defendant, if there had not been an express agreement between the parties as to this right of lien, inserted in the charter-party itself. The charter-party states "that it is expressly agreed and understood between the parties that the ownership of the ship during the continuance of this charter-party shall remain firmly, and be fully vested in the said owner, and that he shall at all times during the said intended voyage and service, have a full and complete lien upon the lading of the said ship, as well for all losses and damage which the said owner may sustain or be put to in consequence

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quence of the non-payment of any of the bills, to be given for freight, as for all arrears of freight, &c.; and shall have full power and authority to hold and retain the said goods until full payment of all such losses, charges, damages, and arrears of freight paid for or on account of the said *H. R. Wilkinson*, and which he of right ought to bear and pay agreeably to the true intent of the said charter-party." And after so full and unequivocal a declaration of intention that the owner shall retain the right of lien upon the lading of the vessel, we think it unnecessary to discuss whether such consequence would, or would not have followed from the relation in which the parties have placed themselves with respect to each other by the other provisions of the charter-party. An express contract is the strongest and surest ground upon which the right of lien can in any case be placed: and in this charter-party the charterer has in effect covenanted with the ship-owner, that whatever may be the legal operation of the charter-party, as between themselves, the charterer's possession of the ship shall be the possession of the owner, so far as the right of the latter to a lien on the cargo is in any way concerned. It is contended, however, on the part of the Plaintiffs, that, admitting such right of lien to exist with respect to so much of the lading as was the property of the charterer, no such lien can extend to any part of the lading on board the vessel which was the property of third persons: that in the present case the rice and saltpetre are the property of the Plaintiffs, who became the indorsees of the bill of lading, for a valuable consideration, without notice of the terms of the charter-party; and consequently, that they stand in the same situation as any shipper, whose goods are put on board under a bill of lading, and who is entitled to receive them after the voyage is performed upon tendering the freight mentioned in the bill of lading, without being

being affected by any private agreement between the charterer and the owner of the ship. That a shipper putting his goods on board the ship, as a general ship, upon the faith of a bill of lading signed by a person whom the owner has allowed to bear the character of master, would be entitled to receive his goods at the end of the voyage upon payment of the freight reserved by the bill of lading, may be readily admitted, as well upon the reasonableness of the proposition itself, as upon the authority of the decided cases referred to by the Plaintiffs in the course of the argument. No question, however, arises in this case, as to goods the property of third persons, originally loaded by them on board the ship; all such goods having been duly delivered, so far as appears, to the consignees, or the indorsees of the bills of lading. But the present case is reduced to the single enquiry, whether, under the circumstances stated in the special case, the rights of the Plaintiffs, with respect to these goods are the same, (as contended for them), as the rights of an indorsee for a valuable consideration of a bill of lading given to a shipper, who has loaded his goods on board the ship, as a general ship, and without notice of any agreements between the charterer and the owner of the ship: and we are of opinion that the rights of the Plaintiffs are not the same with the rights of shippers under the circumstances above supposed. In the present case the rice and saltpetre were purchased by *Wilkinson*, the master of the ship, and shipped by him as dead freight on his own account in *January*, 1828. From the moment these articles were loaded on board, the lien of the Defendant attached upon them for the freight and other payments, due to him, under the express contract contained in the charter-party. If the master had sold this cargo of rice and saltpetre to a third person, but still retained it in his possession on board the ship, to be

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carried to *London*, it is difficult to state the principle upon which this lien, once vested in the ship-owner, should have become divested from him by such sale. Where goods are put on board a general ship under a bill of lading, and the owner of the ship has by the charter-party reserved to himself a lien upon the goods laden on board the ship, for his freight due under the charter-party, he has such lien to the extent of the freight due for these particular goods under the bill of lading, whether the goods remain the property of the same person during the voyage, or are sold, before delivery, to a stranger: or, in other words, the extent of the ship-owner's lien remains unaltered, whether the bill of lading is indorsed to a third person for a valuable consideration, or the goods are deliverable to the original consignee. And upon the same principle it would seem to follow that if the lading of the ship belongs to the charterer, and such lading is subject to the ship-owners lien for the freight reserved by the charter-party, such lading if it be sold by the charterer after it is put on board, would pass to the purchaser, subject to the lien which the ship-owner had before the sale.

Such would have been the case if *Wilkinson* had transferred the property in the cargo by an actual sale. But, looking at the whole of this transaction, it appears to us that it is not, in any point of view, a sale by *Wilkinson to the Plaintiffs*, nor can the Plaintiffs be considered as indorsees of the bill of lading for a valuable consideration. The whole of the transaction by which the property was altered took place at *Calcutta*, between *Boyd*, *Beeby*, and Co. on the one part, and *Wilkinson*, the charterer of the ship, on the other part. The Plaintiffs were entire strangers to any part of the transaction; and have no other concern in it except as agents and correspondents of *Boyd*, *Beeby*, and Co., upon whose title, and whose title only, they can stand. — For the bill of lading was

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endorsed by *Boyd, Beeby*, and Co. to the Plaintiffs for no other purpose than to enable them, out of the proceeds of the rice and saltpetre, to pay the amount of the bills of exchange drawn upon them by *Wilkinson* in favour of *Boyd, Beeby*, and Co. for the sums advanced by the latter to *Wilkinson*. If, therefore, the Plaintiffs are unable, from a defect in the title of *Boyd, Beeby*, and Co., the indorsers of the bill of lading, to retain the proceeds of these goods in satisfaction of the bills of exchange drawn upon them, they may repay themselves the amount of the money so paid to the use of *Boyd, Beeby*, and Co., out of other funds in their hands, if any, or may recover it back by action against *Boyd, Beeby*, and Co.

The case therefore must be considered as if *Boyd, Beeby*, and Co. were the Plaintiffs on the record, and the question as to these parties will turn upon this point, what is the real character of the transaction at *Calcutta?* And it appears to us that it amounts in substance to an assignment by *Wilkinson*, to *Boyd, Beeby*, and Co. of the bags of rice and saltpetre then laden on board, and being his property, as a security for the payment of 800*l.* which had been advanced by them to him. The case states in terms that *Wilkinson* applied to *Boyd, Beeby*, and Co. for a loan of 800*l.* upon the security of the rice and saltpetre, and that the bill of lading was made and indorsed to them in pursuance of that agreement; that the 800*l.* was advanced under such agreement; and that the bill of lading was indorsed to the Plaintiffs as a security for the repayment of the amount of the bills drawn on the Plaintiffs. The whole transaction therefore was a security, and nothing more. But if a formal assignment by way of mortgage had been actually made, such assignment must have been subject to the owner's lien which had already attached, and was then actually existing: for *Boyd, Beeby*, and Co. claiming under *Wilkinson*, could only take what he could legally grant; that

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is, the right to the cargo, subject to the ship-owner's lien for the freight and other payments due under the charter-party.

It has been urged in argument, that this construction throws a considerable hardship on *Boyd*, *Beeby*, and Co., who acted in ignorance of the existence of any charter-party, or of the reservations thereof. But it seems a sufficient answer, that a very little enquiry on their part would have been sufficient to enable them to discover the rights of the ship-owner reserved by the charter-party. It was surely no more than what common attention to their own interest required, to make some enquiry as to the terms on which the master's goods were to be carried, before they advanced money on the security of the goods; more particularly when the very form of the bill of lading, signed by *Wilkinson* as master, by which he appears to be also the shipper of the goods, and to make them deliverable to his own order on payment of certain freight, was calculated to provoke some enquiry as to the exact relation in which *Wilkinson* stood with respect to the ship.

But whatever may be the hardship on either party, this case is to be determined by reference to their strict legal rights; and as it appears to us that the title of the Defendant, as ship-owner, to a lien on these goods, is prior in point of time to that of the Plaintiffs, as indorsees of the bill of lading for the purpose of securing advances made to the master, we think the Defendant's lien is to be preferred to the Plaintiffs' title under the indorsement, and, consequently, that the verdict should be entered for the Defendant.

Judgment for the Defendant.

HAGUE *v.* LEVI.

Jan. 21.

JONES Serjt. moved to discharge the Defendant on entering a common appearance, for a defect in the affidavit to hold to bail, which did not disclose the Plaintiff's residence, and alleged that the Defendant was indebted to the Plaintiff in the sum of 50*l.* for money had and received to the Plaintiff's use, *and* for money lent by the Plaintiff, without distinguishing how much was due on the one account and how much on the other.

Affidavit to hold to bail for 50*l.*, for money had and received to Plaintiff's use, and money lent by Plaintiff, without distinguishing how much is due on one account and how much on the other, Held sufficient.

But the Court thought the affidavit sufficient, and

Jones,

Took nothing.

MARSHALL *v.* PITMAN.

Jan. 23.

THIS was an action of replevin by the Plaintiff for taking his goods. The Defendant justified the taking, as a distress for a poor rate, under the 43 *Eliz.* *c.* 2.

Where a party, having no stock in trade, is rated as an *inhabitant* of a parish, his remedy is by appeal to the quarter sessions. Replevin does not lie for a distress under such a rate.

At the Summer assizes for the county of *Somerset* 1832, a verdict was found for the Plaintiff, damages 1*s.*, subject to the opinion of this Court on the following case:—

The Plaintiff was a surgeon and apothecary, and an inhabitant and the occupier of a house in the parish of *Shepton Mallett*. The Plaintiff was rated to the relief of the poor of the said parish in four several rates: the

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first made on the 29th *September* 1831, the second on 16th *November*, the third on the 28th *December* in the same year, and the fourth on the 15th *February* 1832. The form of the assessment was as follows:

"An assessment for the relief of the poor on the 29th day of *September* 1831, at 1*s.* in the pound:— *P. B. Marshall*, or occupiers, — house and garden, 1*l.* 16*s.* *P. B. Marshall*, profits on stock in trade, 13*s.*"

"16th *November*, *P. B. Marshall*, occupier, — for house and garden, 1*l.* 16*s.*"

Same date — "assessment on the inhabitants of *Shepton Mallett*, on their stock in trade or personal property. — *P. B. Marshall*, apothecary, 13*s.*"

28th *December* 1831, — the same, verbatim, as the assessment of 16th *November*.

15th *February* 1832, — the same, verbatim, as the assessment of 16th *November*.

These several rates were duly made, allowed, and published, and the several sums duly demanded of the Plaintiff. The Plaintiff paid the several assessments on him as occupier, but refused to pay the several sums of 13*s.* according to the other assessments, and there was no evidence of his having appealed against any of the rates to the quarter sessions in due form of law. Upon such refusal, a warrant of distress was issued for the last-mentioned sums. The Plaintiff's goods were seized under such warrant, and replevied by the Plaintiff.

At the time of making the rates in question, the Plaintiff was an inhabitant of the said parish, and carried on an extensive business as surgeon and apothecary, and had a stock of drugs and medicines which he dispensed to the patients whom he attended as apothecary, but did not sell them to any other persons. He made up the prescriptions of physicians for patients whom he attended jointly with such physicians, but not for any

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one else. He had no shop open to the street, nor had he any personal property or stock in trade in respect of which he was liable to be rated, unless the said stock of drugs and medicines made him liable. Although the three last rates were expressed to be on the inhabitants, on their stock in trade or personal property, yet, in fact, no personal property, except stock in trade, was included in the rate.

The case set out a copy of a bill of the Plaintiff's, with several items, delivered to one of his patients, for pills, draughts, powders, and mixtures; to another, for attendance, applications, cure of fractured arm, pills and mixtures; and to a third, for bleeding, pills, draughts, powders, mixtures, blisters, introducing a catheter into the bladder, and ointment. The inhabitants of the parish of *Shepton Mallett* had been rated in respect of their stock in trade for upwards of the last 100 years, up to the time of these several rates. During all that time, surgeons and apothecaries, inhabitants of the parish, had been rated for their stock of medicines and drugs in the same manner as the Plaintiff was in the said several assessments, and such sums had been paid. In the years 1829 and 1830 the Plaintiff was a partner with one *John Mines*, a surgeon and apothecary at *Shepton Mallett*; and during that time, they were jointly rated for their profits on their stock in trade as such apothecaries; and such assessments were paid. *J. Mines* died in *November* 1830, and the stock of drugs, medicines, and bottles, to the value of 100*l.*, was removed from the place of business of *Mines* and the Plaintiff, to the place of business of Plaintiff; and the counter, drawers, and shelves, were also removed to the same place. A Mr. *Edgar*, at the trial, proved that he was a surgeon and apothecary, and had resided in the parish for twenty-five years; that during that time he had been rated to the relief of the poor for the medi-

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cines and drugs which he kept as apothecary, and had paid those rates. He made a profit on his drugs, which he sold generally only to his patients, and not by retail: if families, who were his patients, at other times wanted medicines, he sold them; but never to strangers. In one of his residences he had a shop open to the street.

The questions for the opinion of the Court were, first, whether the Plaintiff could maintain this action, he not having appealed to the quarter sessions: if not, the verdict was to be for the Defendant. Secondly, whether the Plaintiff, under the above circumstances, was liable to be rated: if he was so liable to be rated, the verdict was also to be for the Defendant. Either party to be at liberty to turn the case into a special verdict.

The case was argued by *Wilde* Serjt. for the Plaintiff, and *Mercwether* Serjt. for the Defendant. It will be convenient to begin with the

Argument for the Defendant. This action does not lie against the Defendant. The Plaintiff's remedy, if he be aggrieved by the rate, is by appeal to the court of quarter sessions. By the 43 *Eliz. c.* 2. *s.* 1. it is enacted, that the overseers of every parish, "shall take order from time to time, by and with the consent of two or more justices of peace, — to raise weekly, or otherwise, (by taxation of every inhabitant, parson, vicar, and other, and every occupier of lands, &c. — in such competent sum and sums of money as they shall think fit,) — competent sums of money for and towards the necessary relief of the lame, impotent, old, &c. — to be gathered out of the same parish, according to the ability of the same parish."

Had the Plaintiff been neither an inhabitant of the parish, nor an occupier of land, &c. within it, the Defendant would have been acting without jurisdiction. But it is found that the Plaintiff *was* an *inhabitant*; the

magis-

magistrate therefore, whether the plaintiff possessed personal property or not, acted within his jurisdiction, in consenting that the Plaintiff should be put on the rate in respect of such inhabitancy, and if the Plaintiff had no personal property, or was rated too highly, his only course was to appeal against the rate; for inhabitants are to be rated according to their ability. *Rex* v. *Gosse* (*a*). In *Milward* v. *Caffin* (*b*), the Plaintiff was rated for lands not in his occupation; the justices therefore had no jurisdiction, and the action might well lie. So, in *Lord Amherst* v. *Lord Somers* (*c*), the Plaintiff had been rated for the occupation of stables which had not been used by him, but by a troop of horse-guards. In like manner, if the rate be altogether a *nullity*, as for want of publication or otherwise, the justices are without jurisdiction: *R.* v. *Newcombe* (*d*). But in *Hutchins* v. *Chambers* (*e*), Lord *Mansfield* says, a mere *defect* in the rate, unappealed from, does not avoid the warrant of distress. In *Bonnell* v. *Beighton* (*g*), where an inclosure act gave commissioners power to set out and make roads, &c., and directed that the expences of making and repairing those roads, and all other expences should be borne by the proprietors in certain proportions, to be ascertained by the commissioners in one general rate, and then gave an appeal to the sessions in all cases where the parties should think themselves aggrieved; it was held, that an objection to the rate on account of the commissioners having expended money on an improper object, could not be tried in an action of trespass, but that the party aggrieved must appeal to the sessions. The same principle was recognised in *Cortis* v. *Kent W. W. Company* (*h*), and *Fawcett* v. *Fowlis* (*i*). In *Dur-*

(*a*) 7 *B.* & *C.* 60.
(*b*) 2 *W. Bl.* 1330.
(*c*) 2 *T. R.* 372.
(*d*) 4 *T. R.* 368.
(*e*) 1 *Burr.* 587.
(*g*) 5 *T. R.* 182.
(*h*) 7 *B.* & *C.* 314.
(*i*) 7 *B.* & *C.* 394.

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rant v. *Boys* (*a*) it was held, that if a person rated to the poor had any objection to the rate, *e. g.* that it was made for six months, he must appeal to the next sessions; and if he did not appeal, he could not bring trespass against those who distrained on him for non-payment of the rate.

At all events, the Plaintiff's drugs and medicines constituted a stock in trade, or visible personal property yielding a profit, for which he was liable to be rated. Surgeons and apothecaries retail their drugs at a higher price than they buy them, and the application of skill in compounding medicines no more exempts the materials from rateability, than the application of the shoemaker's skill exempts the leather which forms his stock in trade.

Argument for the Plaintiff. The Plaintiff was liable to be rated, and within the Defendant's jurisdiction, not as an inhabitant simply, but as an inhabitant having ability to contribute to the rate. If he had no ability, he was not liable to be rated, and not within the Defendant's jurisdiction. But he had no ability, unless his medicines constituted stock in trade; and they are no more stock in trade than the ink and parchment of a lawyer, or the tools of a mechanic. They are mere accessories to personal skill, which cannot be the subject of a rate: *R.* v. *Startifant* (*b*). Stock in trade constitutes the ability of the inhabitant as much as land constitutes the ability of the occupier; and if the justice is without jurisdiction where a party is rated in respect of premises which he does not occupy, so he is without jurisdiction where an inhabitant is rated in respect of ability which he does not possess; in the one case as in the other, there is nothing on which the rate can attach.

(*a*) 6 *T. R.* 580. (*b*) 7 *T. R.* 60.

Milward

Milward v. *Caffin*, therefore, and *Lord Amherst* v. *Lord Somers*, are cases in point for the Plaintiff. The rate being without object, is a nullity, and cannot be enforced, even though confirmed on appeal. *R.* v. *Newcombe*. Although therefore an appeal may lie against a rate, a party aggrieved by it is not in all cases precluded from proceeding by action. If it were otherwise, he might be without redress where an improper rate is confirmed on appeal. But wherever the rate is a nullity, the justice is without jurisdiction, and an action lies if he issues a warrant of distress. The quantum, indeed, or any overcharge in the rate, is only to be controverted by an appeal to the quarter sessions. *Nolan*, 257. (4th ed.)

TINDAL C. J. The first question upon this case is whether the Plaintiff can maintain this action, not having appealed to the court of quarter sessions against the rate; and that involves the question, whether the magistrates had jurisdiction to make the rate, because if they had, that rate was a subject of appeal. Looking at the words of the statute of 43 *Eliz. c.* 2. *s.* 1., I am of opinion the magistrates had jurisdiction. The words are that the overseers of every parish "shall take order from time to time, by and with the consent of two or more justices of the peace — to raise weekly or otherwise, (by taxation of every inhabitant, parson, vicar, and other, and of every occupier of lands, &c., — in such competent sum and sums of money as they shall think fit,) — competent sums of money for and towards the necessary relief of the lame, impotent, old, &c., — to be gathered out of the same parish, according to the ability of the same parish."

To rate in such sum as they shall "think fit" does not import that they have a power to rate arbitrarily, but to rate the occupier according to the value of his occupation, the inhabitant according to his visible personal property; and

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and in order to determine whether the magistrates had jurisdiction we have only to see whether the Defendant was inhabitant or occupier. In *Milward* v. *Caffin*, it was a dry question of fact whether the Defendant was an occupier; for it was admitted that if he were, the quarter sessions had jurisdiction in the matter. So here, we must see whether the Defendant is an inhabitant; for if he be, the rate is a question of amount for the sessions. It is admitted that if he had the smallest amount of property to be rated, his proper course would be by appeal to the quarter sessions; but it is contended that where he has nothing rateable he is entitled to proceed by action. But the sounder distinction seems to be, that as an inhabitant possessing visible personal property, he is liable to be placed on the rate, although his rateable property turn out afterwards to amount to nothing. This is the ground of my opinion, which renders it unnecessary to decide the second point.

PARK J. concurred.

BOSANQUET J. I am of the same opinion. It is admitted that one question is, whether or not there has been an excess of jurisdiction. By the statute of *Eliz.* the overseer is required to "take order from time to time, by and with the consent of two or more justices of peace, — to raise weekly or otherwise, (by taxation of every inhabitant, parson, vicar, and other, and every occupier of lands, &c., — in such competent sum and sums of money as they shall think fit,) — competent sums of money for and towards the necessary relief of the lame, impotent, old, &c. — to be gathered out of the same parish, according to the ability of the same parish."

The Plaintiff was an inhabitant and possessed personal property; but whether he was of ability to pay rates was a matter for the judgment of the overseers, subject to an appeal to the quarter sessions. From that decision there might

might have been a case to the King's Bench. This Court cannot overlook those circumstances, and therefore I am of opinion the action does not lie.

ALDERSON J. I am of opinion this action does not lie. The real question is, whether the justices have jurisdiction in the matter; if they have, the course of proceeding is by appeal, subject to a case to the Court of King's Bench. The act says, that the overseers of every parish "shall take order from time to time, by and with the consent of two or more justices of peace, — to raise weekly or otherwise, (by taxation of every inhabitant, parson, vicar, and other, and every occupier of lands, &c., — in such competent sum and sums of money as they shall think fit,) — competent sums of money for and towards the necessary relief of the lame, impotent, old, &c., — to be gathered out of the same parish, according to the ability of the same parish."

That explains the case of *Milward* v. *Caffin*, in which the Plaintiff, who had been rated as an occupier, was proved not to be such.

It is contended that the Plaintiff is not rated as an inhabitant simply, but as an inhabitant with stock in trade, and that if he has no stock in trade it is gross injustice to treat him as a person liable to be rated. But the existence of the jurisdiction is one thing, and the mode of exercising it, another, and if the Plaintiff be an inhabitant he is within the jurisdiction of the justices. This case would go great lengths if we were to decide that every inhabitant could not be rated. Before the late act, it was a grave question whether a party might not insist on being rated, though only a lodger, in order to obtain a vote.

I give no opinion on the second point. But on the first, as we are not the Court to which the appeal should be made, our judgment must be for the Defendant.

Judgment for the Defendant.

1833.

Jan. 23.

BANCKS *v.* CAMP.

Averment, that the Defendant, — who had made a note promising to pay Plaintiff 10*l.* fourteen days after date, and had delivered it to Plaintiff, — promised, when it was due, to pay Plaintiff according to the tenor and effect thereof, Held sufficient on special demurrer.

THE declaration stated, that the Defendant, on the 9th of *November*, 1832, at *London*, made his promissory note in writing and delivered the same to the Plaintiff, and thereby promised to pay to the Plaintiff, fourteen days after the date thereof, 10*l.* on account of Captain *William Henry Driscoll*; which period had now elapsed: and the Defendant, in consideration of the premises, then and there promised to pay the amount of the said note to the Plaintiff, according to the tenor and effect thereof. Upon special demurrer,

Jones Serjt. objected that it was not, with sufficient certainty, shown in the declaration that the supposed promise alleged to have been made by the Defendant was made to the Plaintiff; but merely that the Defendant promised to pay to the Plaintiff the amount of the note; and *non constat* but that such promise was made to another person. It did not appear from the declaration that the supposed promise was made to any person whatsoever.

TINDAL C. J. The necessary intendment on this count, is, that the promise must have been made to the Plaintiff and to no other. The count states, that by the note which was made by the Defendant and delivered by him to the Plaintiff, the Defendant promised to pay the Plaintiff 10*l.* fourteen days after date, and that when the note was due, the Defendant promised to pay according to the tenor thereof. By the tenor of the note, coupled with the delivery, his promise was to the Plaintiff. The utmost ingenuity cannot discover a third person to supplant him.

The rest of the Court concurred in giving

Judgment for the Plaintiff.

1833.

MUSSELBROOK *v.* DUNKIN.

Jan. 24.

An award is to be considered as *published* when the parties have notice that it is ready for delivery on payment of the reasonable charges.

AN award in this cause, made by a barrister under an order of *Nisi Prius*, was ready for delivery on the 19th of *May* last, of which the parties had notice; but an objection being raised to the arbitrator's charges, a rule was obtained in *Trinity* term, *June* 14., to refer it to the prothonotary to tax those charges.

That rule was made absolute *June* 16., the last day of *Trinity* term; and the prothonotary concluded his taxation in *July*.

Neither party, however, took up the award till *Saturday* the 24th of *November* last, when the Defendant obtained possession of it by paying the charges allowed by the prothonotary; whereupon the Plaintiff, on the last day of *Michaelmas* term, *Monday Nov.* 26., obtained a rule *nisi* to set aside the award, on the ground of partiality and misconduct in the arbitrator; his having employed a deputy; the reception of improper evidence; and a decision contrary to evidence.

Taddy and *Coleridge* Serjts., who shewed cause, contended that the application came too late. By analogy to the rule prescribed for awards made under the statute of 9 & 10 *W.* 3. *c.* 15. the application ought to have been made before the last day of the term ensuing the publication of the award. The publication is when the parties receive notice that the award is ready for delivery: and even if under the circumstances of this case the award should be considered as not ready for delivery till the month of *July*, still, an application to set it aside should have been made before the last day of *Michaelmas* term:

Rogers

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MUSSELBROOK v. DUNKIN.

Rogers v. *Dallimore* (*a*), *Rawsthorn* v. *Arnold* (*b*), *Taylor* v. *Gregory*. (*c*) In an order of reference, where the arbitrator's time is limited, the word *publish* can scarcely have a different meaning from the same word in the statute; and awards under such orders would almost always be published beyond the time allowed, if not deemed to be published at the time they are ready for delivery.

Wilde and *Bompas* Serjts. in support of the rule. An award cannot be said to be published to a party before he has notice of its contents. The Defendant had no notice of the contents of this award till the 24th of *November*; if, therefore, he had made his application even in the present term, it would have been an application within the first term after the award was published to him. It would be hard if one party by submitting to an improper charge could take up an award, and so affect the party who resists the charge with notice of publication. The omission to take the award up earlier is the laches as much of the party opposing this application as of the party making it; the party opposing, therefore, is estopped to take the objection.

TINDAL C. J. I think the Plaintiff comes too late. In all cases within the statute *W.* 3. a definite time is prescribed for applications such as the present, namely, before the last day of the term next after the award shall have been made and published. Upon the meaning of the word *made* no difficulty arises: the question is, what is meant by the word *published?* I think that word is satisfied by the award's having been made, and notice having been given to the parties that it is within

(*a*) 6 *Taunt.* 111.
(*b*) 6 *B.* & *C.* 629.
(*c*) 2 *B.* & *Adol.* 774.

their

their reach on payment of just and reasonable expenses. And I concur in thinking that the award cannot be said to be ready when it is only to be had on submitting to a wrongful demand. But here all objection to the arbitrator's demand was ended by the prothonotary's taxation in *July*. It has been urged that it would be hard that the contents of the award should be considered as published to both parties by the mere act of one of them in taking it up: but there are many cases in which neither party is willing to take up the award; and the arbitrator might be deprived of any compensation for his trouble, if notice that the award is ready for delivery upon payment of reasonable expenses were not held a publication of the award.

The objections, too, on which it is sought to set aside this award are (except the last, which affords no ground for the motion,) such as might have been made in *Trinity* term, when the arbitrator's demand was referred to the prothonotary.

PARK J. I am of the same opinion. The applicant knew all the available grounds of objection in *Trinity* term, and I see no reason for departing from the practice, which has been to consider awards under an order of *Nisi Prius* in the same light as awards under the statute 9 & 10 *W.* 3.

BOSANQUET J. Assuming that the award was not published till the prothonotary's taxation of the arbitrator's demand, still the case falls within the rule which has been adopted in conformity with the statute 9 & 10 *W.* 3.

ALDERSON J. I am of the same opinion. This award must be considered to have been published in *July*. The party was bound to apply before the last

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MUSSEL-BROOK v. DUNKIN.

day of the ensuing term, unless he accounts for the delay. It is not accounted for here, because all the available grounds of objection were known in *July*.

Rule discharged.

Jan. 25.

WARD *v.* SHEW and Another.

An authority to tenants "to pay rent to *J. S.*, whose receipt shall be their discharge;" does not entitle *J. S.* to distrain, although he receives the rents for his own benefit.

THE defendant *Shew*, a bankrupt, had conducted himself so satisfactorily towards his creditors, that they required the assignees to reconvey to him his unsold freehold and leasehold estates, and among them a house in the occupation of the Plaintiff.

Before the conveyance was executed the assignees gave *Shew* the following authority:

"Mr. *J. Shew* having completed an arrangement with Messrs. *Arnot* and Co., his assignees, for the five houses in *Chequer Alley*, on the 21st of *May*, instant, and the arrears of rent due thereon, the tenants on the respective premises are hereby authorised to pay their rents to the said *J. Shew*, whose receipt shall be their discharge.

Bowden & Walters,
"*24th May*, 1831. Solicitors to the Commission."

Upon the strength of this authority, *Shew*, in the name of the assignees, distrained on the Plaintiff for rent arrear; whereupon the Plaintiff commenced this action on the case.

The declaration contained several counts for excessive and irregular distress, and one count in trover. The Defendants pleaded the general issue, not guilty, and gave in evidence, the above authority in justification of the distress. At the trial before *Tindal* C. J. a verdict having

having been given for the Defendants on all the special counts, and for the Plaintiff on the count in trover,

Jones Serjt. obtained a rule *nisi* to set aside the verdict for the Plaintiff on the ground that the Defendant had an interest coupled with an authority, or at all events an authority to receive rents, which entitled him to distrain, upon the same principle as a receiver appointed by the Court of Chancery. In *Pitt* v. *Snowden* (*a*), Lord *Hardwicke* said, "receivers appointed by the Court have a power, where they see it necessary, to distrain for rent, and need not apply first to the Court for a particular order for that purpose." *Willatts* v. *Kennedy* (*b*). So they have a power to sue for double value under the statute. *Wilkinson* v. *Colley*. (*c*)

The Judge's report having now been read, the Court called on

Jones to support his rule. He contended that inasmuch as the Defendant was to receive the rent for his own benefit, and his receipt was to discharge the tenant, his case was stronger than that of a receiver in Chancery.

TINDAL C. J. I think we may decide this question without infringing on the rule as to a receiver of the Court of Chancery. Such a receiver is an officer appointed by the Court, under certain well-known rules, and responsible to the Court for any abuse of authority: here, by the very terms of the instrument under which the Defendant justifies, the tenants only are authorised to pay their rent to the Defendant, and to take his receipt as a discharge. What is that but an intimation that the former course of payment being discontinued, they were

(*a*) 3 *Atk.* 750.
(*b*) 8 *Bingh.* 5.
(*c*) 5 *Burr.* 2694.

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WARD v. SHEW.

to be discharged if they paid to *Shew?* But that by no means confers on him a power to distrain. If *Shew* had authority to distrain, he could only have distrained as bailiff to the assignees, and they would have been responsible for any abuse of such authority. Can it be supposed that they would invest him with a power of fighting the battle as to disputed rents at their expense?

PARK J. This is a power to the tenants to pay *Shew*, but not a power to him to demand, much less to distrain, for rent. *Hogg* v. *Snaith* (*a*) is directly in point. There it was held, that a power of attorney to receive all salary and money, with authority to recover, compound, and discharge, and to give releases, and appoint substitutes, did not authorise the attorney to negotiate bills received in payment, nor to indorse them in his own name: nor did a power to transact all business: and that evidence of a usage at the navy-office to pay bills indorsed by the attorney in his own name, and negotiated by him under such a power, could not be received to enlarge the operation of the power. *Mansfield* J. said, "If the evidence of usage had been ten times as strong, it would not have authorised this transaction." And *Lawrence* J. referred to *Hay* v. *Goldsmidt* (*b*), where, under a power to transact all business, "*I.* and *R. Duff* received an *India* bill for 2920*l.* 8*s.* 10*d.*, payable to the testator or his order, which each of them indorsed 'for Major General *Patrick Duff*, *per* procuration, *James Duff*, *Robert Duff*.' They discounted the bill with the defendants, and raised money on it. The defendants, by their broker, received of the *India* Company the money due on the bill. At the trial, a verdict was found for the plaintiffs;

(*a*) 1 *Taunt.* 347. (*b*) 1 *Taunt.* 349.

and

and *Erskine* for the defendants having obtained a rule *nisi*, for setting aside the verdict and entering a nonsuit, the question for the Court of *King's Bench* was, whether *J.* and *R. Duff* had any authority to indorse and discount the bill? The Attorney-General (*Gibbs*), and *Wilson*, shewed cause, and contended that the power of attorney gave the *Duffs* authority to receive only, and not to negotiate the bill. *Erskine* and *Gaselee*, contrà, relied on the words to '*transact all business*,' as giving an authority to do more than merely to receive, and contended, that the indorsement was only a substitution of other persons for the attornies themselves, which the power enabled them to make. The cases of *Howard* v. *Baillie* (*a*), and *Gardener* v. *Baillie* (*b*), were referred to in the course of the argument. The Court was of opinion, that the power to transact business did not authorise the *Duffs* to indorse the bill. The most large powers must be construed with reference to the subject matter. The words '*all business*,' must be confined to all business necessary for the receipt of the money."

That case is precisely in point, The authority of a receiver in chancery to distrain is not disputed, but it rests on totally different grounds.

BOSANQUET J. If this had been an action of replevin, and the Defendant had made cognisance as bailiff of the assignees, his authority might have been traversed; and the question whether he had authority or not, depends on the construction of the instrument of *May* 24. 1831. But the nature of that instrument is an authority to the tenants to pay, not to the Defendant to distrain. The authority to the tenants to pay might perhaps authorise the Defendant to demand, because his receipt is to be a discharge to the tenants; but authorities

(*a*) 2 *H. Bl.* 618. (*b*) 6 *T. R.* 592

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must be construed strictly with reference to their subject matter, and here there is no power to distrain. In *Murray* v. *East India Company* (*a*), it was held, that a power of attorney, authorizing an agent to demand, sue for, recover, and receive, by all lawful ways and means whatsoever, all monies, debts, and dues whatsoever, and to give sufficient discharges, did not authorise him to indorse bills for his principal. This case is distinguishable from that of receivers in Chancery, because they are appointed by and responsible to the Court, and act under settled rules. The present is a private authority, and must be construed in the ordinary way.

ALDERSON J. I am of the same opinion. The instrument contains an authority to the tenants to pay, and to the Defendant to give a discharge, and all powers necessary for those purposes are implied in that authority; but the authority for which the Defendant contends, is one which would render the assignees responsible to the tenants in respect of all acts done by the Defendant. That would be an authority much larger than is necessary for the purpose of receiving rents, and therefore this rule must be discharged.

Rule discharged.

(*a*) 5 *B.* & *Ald.* 204.

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HOPCRAFT *v.* KEYS.

Jan. 26.

REPLEVIN. The Defendant made cognisance as bailiff of *Hawkins* for a quarter's rent of a house, due on the 12th of *May* 1832, from the Plaintiff as tenant to *Hawkins*.

The Plaintiff pleaded *non tenuit*, upon which issue was taken.

It appeared at the trial before *Tindal* C. J., that *Hopcraft* was let into possession by *Hawkins* upon the 12th *February* 1831, as tenant for one year certain, at a rent payable quarterly; *Hawkins* undertaking to finish the house by a certain time, and to give *Hopcraft* the option of a lease at the end of the year. But *Hawkins* himself had no other title to the premises, than an agreement with one *Kent*, bearing date the 17th *September* 1830, by which *Kent* agreed to grant him a lease after *Hawkins* should have finished the houses described in the agreement; reserving to himself an express power of re-entry, and avoiding the agreement, if the houses were not completed within six months from the date of the agreement. It was proved at the trial, that the houses were not finished within the time; and that *Kent*, upon the 2d of *April*, which was before any rent became due from *Hopcraft* to *Hawkins*, re-entered for the condition broken, and turned all persons found upon the premises, and amongst others *Hopcraft*, out of possession. *Kent* immediately put a man into possession of *Hopcraft*'s house, who remained there for five weeks; after which *Kent* proceeded to finish the house, which took up eight or nine weeks more; and subsequently to this *Hopcraft* took the house from *Kent* upon a new

Defendant having only a defeasible title demised to Plaintiff for years: before the first quarter's rent was due, Plaintiff was evicted by title paramount to Defendant's, and remained out of possession for some weeks; he then entered again under a new agreement with the person who had evicted him by title paramount:

Held, that Defendant was not entitled to distrain, and that the eviction might be given in evidence on the issue of *non tenuit*.

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agreement, and for a different rent, under which agreement he was in possession at the time of taking the distress.

It was contended on the part of *Hawkins*, that all this was the result of collusion between the Plaintiff and *Kent*; but that point was left to the jury, who, being of opinion there had been no fraud or collusion, found for the Plaintiff: —

A rule *nisi* was obtained to set aside this verdict, on the ground, that the Plaintiff having taken under *Hawkins*, was estopped to say he had no title: *Balls* v. *Westwood* (*a*), *Parry* v. *House* (*b*), *Neave* v. *Moss* (*c*), *Rogers* v. *Pitcher* (*d*), *Doe* v. *Lady Smythe* (*e*): and that at all events the eviction by *Kent* should have pleaded, and could not be given in evidence on the issue of *non tenuit*.

Andrews Serjt. who shewed cause, admitting that a tenant may not in general dispute his lessor's title, contended, nevertheless, that he may shew such title to have expired before the time of the distress: *England* d. *Syburn* v. *Slade* (*g*), *Neave* v. *Moss*, *Gravenor* v. *Woodhouse* (*h*): and though it be necessarry to plead the eviction where the lessor himself has dispossessed the lessee, yet where the lessor's title has expired, and the tenant actually holds under another, those facts may be properly established under the issue of *non tenuit*.

Wilde and *Coleridge* Serjt. *contrà*, in addition to the cases cited upon obtaining the rule *nisi*, referred to the authorities cited in Serjt. *William*'s note 2. to *Salmon* v. *Smith* (*i*), to show that the eviction of the Plaintiff

(*a*) 2 *Campb.* 11.
(*b*) *Holt N. P.* 489.
(*c*) 1 *Bing.* 360.
(*d*) 6 *Taunt.* 202.
(*e*) 4 *M.* & *S.* 347.
(*g*) 4 *T. R.* 682.
(*h*) 1 *Bingh.* 38.
(*i*) 1 *Wms. Saund.* 204.

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by *Kent* ought to have been pleaded; in which case *Hawkins* might have been prepared with evidence to show collusion.

TINDAL C. J. I hope nothing which I am about to observe, will be supposed to break in upon the established rule of law, that the tenant so long as he remains in possession, shall never be allowed to dispute the title of the landlord from whom such possession was received. But upon the facts proved at the trial of this cause, that rule, as it appears to me, does not apply to the present case; for upon the whole of the evidence, *Hopcraft*, at the time of the distress, was not in possession under any tenancy he derived from *Hawkins*, but under a new and distinct holding which he took from *Kent*, at a period long subsequent to the time when *Hawkins*'s title had expired. The facts were these: *Hopcraft* was let into possession by *Hawkins* upon the 12th of *February* 1831, as tenant for one year certain, at a rent payable quarterly; *Hawkins* undertaking to finish the house by a certain time, and to give *Hopcraft* the option of a lease at the end of the year. But *Hawkins* himself had no other title to the premises than an agreement with *Kent*, bearing date the 17th of *September* 1830, by which *Kent* agreed to grant him a lease, after *Hawkins* should have finished the houses described in the agreement; reserving to himself an express power of re-entry and avoiding the agreement, if the houses were not completed within six months from the date of the agreement. It was proved at the trial that the houses were not finished within the time, and that *Kent*, upon the 2d of *April*, which was before any rent became due from *Hopcraft* to *Hawkins*, re-entered for the condition broken, turning all persons found upon the premises, and amongst others *Hopcraft*, out of possession. *Kent* immediately put a man into possession of

Hopcraft's

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Hopcraft's house, who remained there for five weeks, after which *Kent* proceeded to finish the house, which took up eight or nine weeks more, and subsequently to this, *Hopcraft* took the house from *Kent* upon a new agreement and for a different rent, under which he was in possession at the time of taking the distress. All this might indeed have been colourable, and the result of collusion between the tenant and the ground landlord to get rid of *Hawkins*; and if it had been so, no doubt it would not have had such effect; but the point was left to the jury, who thought there was nothing fraudulent or collusive. I thought, therefore, at the trial, and still think, that it was competent for the Plaintiff to shew that his landlord had a defeasible title only, and that such title was actually defeated before any rent became due, and that the rule above adverted to could not apply to the case where the tenant had been actually turned out of possession, and kept out a considerable time, and afterwards entered under a new agreement *bonâ fide* entered into with a different person.

It is objected, however, that such evidence, if it amounts to an answer to the distress, could not be given in evidence under *non tenuit*, but should have been pleaded specially as an eviction. It may be admitted, that in ordinary cases, an eviction must be specially pleaded; but here the only question was, whether *Hopcraft* held as tenant to *Hawkins* at the time of the distress, not whether he had been tenant to him on former and different occasions; and this was negatived by the evidence, which shewed that, at the time of the distress, he was in upon a contract *bonâ fide* entered into with another person long subsequent to the time when such former tenancy was determined. Such evidence appears to me to be applicable to the issue upon *non tenuit*, and I therefore think the rule should be discharged.

PARK

PARK J. The rule by which a tenant is precluded from contesting his landlord's title, is so well established that it cannot be disturbed; but I put this case on the ground taken by my Lord Chief Justice, that at the time of the distress *Hawkins*'s title had expired, and the Plaintiff did not at that time hold as his tenant.

BOSANQUET J. I am of the same opinion. All collusion in this case has been negatived by the finding of the jury. The question is, whether the Plaintiff was tenant to *Hawkins* at the time of the distress. It is true that a tenant cannot dispute his landlord's title, but he may shew that the title has expired. And what are the facts here? *Kent* had a right to re-enter on the 2d of *April*, if the houses were not finished according to the agreement of the 17th *September*. He did so, and turned the Plaintiff out. It was not necessary that the Plaintiff should contest the right of *Kent* to enter, whose title was clear; he went out, and was actually out of possession for some weeks. It has been contended that this eviction ought to have been pleaded. If *Hawkins*, during the continuance of the term demised by him to the Plaintiff, had evicted his own lessee, the eviction ought to have been pleaded. But when his title had expired, in consequence of which the Plaintiff had been turned out, and had again come into possession under a new and distinct demise by *Kent*, it appears to me that he was entitled to give that matter in evidence under the issue of *non tenuit*.

ALDERSON J. I am not free from doubt in this case, but as the rest of the Court entertains a clear opinion, I am not prepared to disagree.

Rule discharged.

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Jan. 28.

ALLAN and Another *v.* KENNING.

"Whereas *W. C.* is indebted to you, and may have occasion to make further purchases from you, as an inducement to you to continue your dealings with him, I undertake to guarantee you in the sum of 100*l.* payable to you in default on the part of the said *W. C.* for two months:" Held, a continuing guaranty.

ASSUMPSIT on the following guaranty: —

"Gentlemen,

"Whereas *W. Couchman* is indebted to you in a sum of money, and may have occasion to make further purchases from you, as an inducement to you to sell him such goods, and continue your dealings with him, I hereby agree and undertake to guarantee you in the sum of 100*l.*, payable to you, in default on the part of the said *W. Couchman*, for two months.

"*July* 24th, 1829. *J. Kenning.*

"To Messrs. *Allan.*"

The declaration, setting out the guaranty according to its supposed legal effect, stated the 100*l.* to be payable to the Plaintiffs on *two months' notice* of the default of *W. Couchman.*

At the time of the guaranty *Couchman* was dealing with the Plaintiffs at a credit of four months. In *January* 1830 he failed, being at that time more than 100*l.* in debt to the Plaintiffs.

At the trial before *Tindal* C. J. it was contended, on the part of the Defendant, that this guaranty was to enure for two months only from the time it was given; but the Chief Justice esteeming it a continuing guaranty, a verdict was found for the Plaintiffs, which

Jones Serjt. obtained a rule *nisi* to set aside, and enter a nonsuit instead, upon the objection taken at the trial, and also for a variance in the declaration, contending that, by no construction of the guaranty, could the Defendant claim two month's time for payment after notice of *Couchman*'s default; for, if so, the Plaintiffs might

might be obliged to give six or eight months' credit instead of two.

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Andrews and *Stephen* Serjts., who shewed cause, argued that, as *Couchman* was dealing at a credit of four months, the guaranty would have been useless if it were to secure the Plaintiffs for no more than two months from its date; and that, as to the alleged variance in the declaration, it was the only exposition which the obscure language of the latter part of the guaranty admitted of. They contended, also, that this objection had not been taken at the trial, and, therefore, ought not to be entertained now.

Jones having been heard in support of his rule,

TINDAL C. J. said, I entertain no doubt that this is a continuing guaranty, and that it was to be binding on the Defendant till the parties came to an understanding that they would be off.

"Whereas *W. Couchman* is indebted to you in a sum of money, and may have occasion to make further purchases,"—it is to be observed that there is no limitation of time for such purchases — "as an inducement to you to sell him such goods, and *continue* your dealings with him, I hereby undertake to guarantee you." This indicates a clear intention that the dealings should be continued until further notice.

Is there, then, any variance in the statement of the Defendant's undertaking? That depends on the natural meaning of these words, "I undertake to guarantee you in the sum of 100*l.*, payable to you in default on the part of the said *W. Couchman* for two months." I should infer from these words, that on the default of *W. Couchman* for two months, the Defendant would immediately be liable; but it is alleged in the declaration, that he

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he was to be liable on receiving two months' *notice of Couchman's* default. As it might not be possible to serve the Defendant with immediate notice, that construction might protract his liability beyond the period intended. It seems therefore that the statement objected to is a variance. But as it is not agreed whether the objection was taken at the trial, instead of a nonsuit there must be a new trial on payment of costs by the Plaintiff; however, as the Plaintiff will be permitted to amend, it will be better that the Defendant should consent to pay the sum sought to be recovered, deducting his costs of the late trial.

The rest of the Court concurring, the rule was made absolute for a new trial.

Rule absolute accordingly.

Jan 29. PATTERSON *v.* POWELL.

Notice of trial given by an attorney who has omitted to take out his certificate, is irregular.

NOTICE of trial by proviso in this cause having been given by one who was an attorney duly certificated at the commencement of the cause, but who at the time of the notice in question had failed to take out his annual certificate,

Wilde Serjt. moved to set aside the notice of trial as irregular.

Taddy Serjt., who shewed cause, contended that though the attorney might be liable to penalties he was still the attorney in the cause till another was appointed by the authority of the Court. If a cause be commenced by one who is not an attorney it may be admitted the proceedings

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proceedings are irregular; but, when the cause has been properly commenced, the client ought not to suffer from an inadvertence as to a mere fiscal regulation foreign to the merits of the cause.

Sed per Curiam. The rules of the Court require that all notices in a cause shall be signed by an attorney in the cause. Here the notice was signed by one who had not taken out his certificate, and therefore was not entitled to practise at all. What difference is there between setting aside this one proceeding, and the one by which the cause is commenced? The words of the statute 37 *Geo.* 3. *c.* 90. *s.* 30. are, that if any person without certificate shall sue out any writ, or *carry on* any any action, he shall forfeit 50*l.*; and by *s.* 31. "every person admitted, sworn, and enrolled in any of the said courts as therein mentioned, who shall neglect to obtain his certificate thereof, in the manner before directed, for the space of one whole year, shall from thenceforth be incapable of practising in his own name, or in the name of any other person, in any of the said courts, by virtue of such admission, entry, and enrolment, and the admission, entry, and enrolment of such person, in any of the said courts, shall be from thenceforth null and void."

Rule absolute. (*a*)

(*a*) See *Welch* v. *Pribble*, 1 *D.* & *R* 215.

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Jan. 9.

FAIRCLOTH *v.* GURNEY, Clerk.

1. A sum contracted for, to be paid as an annuity, being partly secured by the transfer of a policy of insurance on the life of the grantor, was in the annuity deed, increased by the amount of the annual premium on the policy, which the grantee covenanted to pay: Held, that this covenant was not a pecuniary consideration to be specified in the memorial, and that the amount of the annuity was properly described in the memorial as a total compounded of the sum originally contracted for with the annual premium of the policy added to it.

BY indenture of *November* 17th, 1828, *Gurney*, in consideration of 720*l.* paid to him by *Faircloth*, as it was recited, partly in notes of the Bank of *England* and partly in sovereigns, for the purchase of an annuity of 113*l.* 19*s.* 6*d.*, covenanted with *Faircloth* to pay him such annuity for ninety-nine years if *Faircloth*, one *Spicer*, and one *Luking*, or either of them, should so long live. By the same deed *Gurney* charged his rectory of *St. Clement's Danes*, in *Middlesex*, with the payment of this annuity, giving *Faircloth* a power to sequester it upon any of the quarterly payments of the annuity being in arrear thirty days. *Gurney* covenanted not to vacate the living, or if he took another in exchange, to charge the substituted rectory with this annuity. As a further security, a policy of assurance effected on *Gurney*'s life for 1000*l.* was by the same deed assigned to *Faircloth*; *Faircloth* covenanting with *Gurney* to pay the annual premium on the policy, 33*l.* 19*s.* 6*d.* There was a power to sell the policy if it should become necessary; the surplus produce of the policy after payment of all arrears and charges to go to *Gurney*, his executors, &c. *Faircloth* agreed after two years, upon three months' notice, to accept 800*l.* together with all arrears and costs occasioned by nonpayment of the annuity, in redemption of the annuity. In the recital of the deed it was stated that *Faircloth* had agreed to defray the expense of preparing and engrossing the securities, and enrolling a memorial of the same.

2. The deed by which the annuity was granted, contained a charge on a rectory, but a warrant of attorney which accompanied the deed, though it recited the deed, gave no authority to sequester the rectory: Held, that the deed was only void *pro tanto*, and that the warrant of attorney was unimpeachable.

3. The deed recited the consideration for the annuity to have been paid in notes and sovereigns: the memorial stated it to have been paid in notes: Held sufficient.

In

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In addition to this deed *Gurney* executed a warrant of attorney of the same date, authorising *Faircloth* to enter up judgment against him for 1440*l.* and costs. The warrant of attorney recited the deed, and authorised *Faircloth* to sue out such execution or executions as he should think fit for any arrears of the annuity, but did not expressly authorize a sequestration of the rectory, or refer to it in any way other than by reciting the deed.

The memorial stated the nature and date of the instruments by which the annuity was secured, to be, "Indenture or deed of grant of annuity of the 17th of *November* 1828," and "Warrant of attorney to confess judgment for the sum of 1440*l.* besides costs of suit: same date." And the consideration, and how paid, "Seven hundred and twenty pounds paid in notes of the Governor and Company of the Bank of *England;*" which was according to the fact.

Faircloth died in *December* 1828.

Gurney having deposed that he had stipulated to receive 800*l.* for the consideration of the said annuity, he, *Gurney*, paying the reasonable expenses of preparing the securities, but that *Faircloth*'s agent had deducted 80*l.* for the expenses, of which he had never rendered any account, leaving *Gurney* only 720*l.* to receive; and that it was the consideration of the grantee's paying the premium on the policy, and nothing else, which induced him to increase the annuity to 113*l.* 19*s.* 6*d.*,

Stephen Serjt. obtained a rule *nisi* calling on *Faircloth*'s representatives to shew cause why the warrant of attorney given as above, and the judgment signed and entered up thereon, should not be set aside, and why the deed of annuity should not be delivered up to the Defendant or his attorney, to be cancelled, on the following grounds: — First, that the memorial of the deed did not mention the covenant by the Plaintiff to pay the annual premium of 33*l.* 19*s.* 6*d.* upon the policy for

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1000*l.* assigned to him by the Defendant, the same being a substantive part of the consideration for which the annuity was granted. Secondly, that if it was not necessary to mention that covenant, the deed should have been memorialized as granting an annuity of 80*l.* only, and not of 113*l.* 19*s.* 6*d.* Thirdly, that no memorial had been enrolled of the assignment of the policy. Fourthly, that *Norton*, the attorney of the Plaintiff, misapplied 80*l.*, part of the consideration money for the annuity, and omitted to insert the same in the deed and memorial as part of the real consideration money. Fifthly, that the deed recited the 720*l.*, the alleged consideration money, to have been paid in notes and sovereigns, but the memorial mentioned notes only. Sixthly, that the deed contained a charge on the Rectory of *St. Clement Danes*, whereof the Defendant was then rector.

Gurney having now filed an affidavit which afforded some colour for supposing that the rule had been obtained on his behalf, (see *antè*, p. 456.) the Court consented to hear

Wilde Serjt., in answer to the objections thus raised to the validity of the annuity.

With respect to the fourth objection, *Brown*, *Gurney*'s agent, deposed that *Gurney* had proposed to grant an annuity of 80*l.* for the sum of 800*l.*; but that *Faircloth* required the assignment of the policy of assurance as a security; that the annuity should be increased by 33*l.* 19*s.* 6*d.*, the annual premium on the policy, *Faircloth* covenanting to pay the premium, and to defray all the expense of preparing the securities, upon *Gurney*'s consenting to take 720*l.* for the annuity, instead of 800*l.*; That these terms were explained, and fully assented to by *Gurney*; that the money was paid in notes; and that, upon the execution of the deed, the parties forgot to erase the words "*and sovereigns.*"

As to the first and second objections, it was contended that

that it is not necessary, under the 53 *Geo.* 3. *c.* 141., to state in the memorial any other than the *pecuniary* considerations for granting the annuity. In *Yems* v. *Smith* (*a*), *Abbott* C. J. says, "It is only necessary to read the schedule, the seventh column of which has these words: — 'Consideration, and how paid.' It is obvious, therefore, that the consideration there spoken of is a consideration which can be *paid*. The clause for redemption cannot, therefore, come within the schedule; and, if any thing not specified in the schedule be necessary, the schedule itself would be worse than useless."

If it be unnecessary to specify the clause for redemption, it must be equally so to set out particular covenants.

As to the third, — in *Morris* v. *Jones* (*b*), it was held unnecessary to specify in the memorial the assignment of a policy of assurance, by way of collateral security, even where that assignment was by a separate deed: *à fortiori* it must be unnecessary where the assignment is contained in the deed pointed out by the memorial.

As to the fifth objection, — if the payment were made in money, it is immaterial whether it was paper money or coin. The object of the statute, in requiring a memorial of the mode of payment, was to prevent the borrower from being paid in goods, which he could only sell at a sacrifice.

With respect to the sixth, — it must be admitted that the charge on the rectory is void; *Newland* v. *Watkin* (*c*), and the authorities there referred to: but the deed is only void *pro tanto*, and stands good in all other respects. *Mouys* v. *Leake*. (*d*) And upon an application to cancel an annuity deed, the Court has a discretionary power to deal with the case according to justice. *Girdlestone* v. *Allan*. (*e*)

(*a*) 3 *B.* & *Al.* 206.
(*b*) 2 *B.* & *C.* 232.
(*c*) 9 *Bingh.* 113.
(*d*) 8 *T. R.* 411.
(*e*) 1 *B.* & *C.* 61.

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Stephen. The payment of the premium on the policy by the grantee was part of the pecuniary consideration moving *Gurney* to the grant: for it is the same thing whether money be paid *to* the grantor, or paid *for* him; particularly where the object of the grantor, in raising money, is to relieve himself from difficulties: and *Gurney* expressly deposes, that but for the covenant by the grantee to pay the premium, an annuity of 113*l.* 19*s.* 6*d.* instead of 80*l.* would not have been granted.

With respect to the mode of payment, the grantee is estopped by his deed to say that it was not in notes and sovereigns: the memorial therefore cannot be said to state the payment according to the fact. The memorial indeed would be useless for the purpose of giving a clue to the transaction, and might even mislead, if it did not pursue the statement in the grant; and though the discrepancy here may appear to be slight, yet it is impossible to draw any line, and facts or writings may be misstated to a mischievous extent if the Courts allow any departure from the precise enactment of the statute.

But the charge on the rectory is clearly void: *Shaw* v. *Pritchard* (*a*), *Flight* v. *Salter* (*b*), *Gibbons* v. *Hooper* (*c*): and if so, the covenant to pay the annuity and the warrant of attorney must also fall to the ground; for the charge on the rectory is the principal security; the covenant to pay and the warrant of attorney are only accessories; the accessory must follow the fate of its principal; and no one shall be permitted to do indirectly what he cannot do directly: *Doe dem. Mitchinson* v. *Carter* (*d*). But if the covenant to pay, and the warrant of attorney to enforce it, be allowed to stand, the grantee may issue a sequestration against the rectory, and so obtain indirectly what the deed is not allowed to secure to him directly. In

(*a*) 10 *B.* & *C.* 241.
(*b*) 1 *B.* & *Ad.* 673.
(*c*) 2 *B.* & *Ad.* 734.
(*d*) 8 *T. R.* 57. 300.

Mouys

Mouys v. *Leake*, the Court refused to cancel the deed; but at that time it had not been expressly determined that a charge on the rectory was void, and Lord *Kenyon* abstained from deciding the point.

TINDAL C. J. Upon this motion for setting aside an annuity granted by the Defendant, and a judgment for securing it, entered up under warrant of attorney, the first objection, which involves also the second, is, that unless the covenant of the Plaintiff for paying the premium of the insurance be deemed an essential part of the consideration for granting the annuity, it must be deemed an annuity for 80*l.*, and not for 113*l.* 19*s.* 6*d.*; and if it be an essential part of the consideration, it ought to have been specified in the memorial. It is said that this covenant was a moving cause for the grant of the annuity: but, are moving causes of such a nature, considerations, within the meaning of the act, to be specified upon the memorial? The words of the act are, "that the memorial shall, among other things, contain the pecuniary consideration or considerations for granting the annuity, in the form or to the effect following." Then follows a general form of the memorial; and one of the columns is headed, "Consideration, and how *paid.*"

In any ordinary meaning of these words, this covenant cannot be considered as a pecuniary consideration; and in *Buckridge* v. *Flight* (*a*), *Abbott* C. J. says, "It is not required that there should be a memorial of the *transaction*, but of the instrument whereby the annuity is granted and secured:" in *Morris* v. *Jones* (*b*), — "It appears, both from the words of the enacting clause, and from the general form of memorial given, that the *pecuniary* consideration is the only consideration contem-

(*a*) 6 *B.* & *C.* 53. (*b*) 2 *B.* & *C.* 235.

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plated by the legislature:" and in *Yems* v. *Smith* (*a*), — "If any thing not specified in the schedule be necessary, the schedule itself would be worse than useless." In *Morris* v. *Jones*, which has a strong reference in its facts to the present case, it was agreed between the grantor of an annuity and the grantee, that the latter should advance a specific sum of money upon annuity (to yield to the grantee 7 per cent. per annum), secured upon landed estates, of which the grantor was tenant for life; and that, for securing the sum advanced, certain policies of assurance already effected on his life should be assigned to the grantee. The amount of the annual sums payable was fixed at a sum composed of 7 per cent. upon the principal sum advanced, and the amount of the annual premiums payable on the policies to be assigned; and in the deed of grant this was stated to be the annuity granted. The policies were assigned by a separate deed; and there was a stipulation in it, that they should be re-assigned to the grantor whenever he redeemed the annuity. In the memorial, the principal sum advanced was stated to be the consideration paid; and the annuity to be the annual payment reserved by the deed; but the assignment of the policies was not mentioned. It was held, that it was not necessary to mention the latter deed in the memorial, and that the principal sum advanced was properly stated to be the consideration paid for the annuity. Upon the third objection, therefore, that case is stronger than the present, because the policies were assigned by a separate deed. Inasmuch, then, as the memorial, in the present case, sets forth the deed which contains the assignment of the policy, I cannot consider it in that respect insufficient. Neither upon the words of the statute, nor upon the decisions, nor upon the reason of the thing, is more neces-

(*a*) 3 *B.* & *Al.* 208.

sary,

sary, with reference to the consideration or the assignment of the policy.

That disposes of the three first objections.

The fourth is a mere question of fact; but we should be very careful how we proceed where an annuity has been paid without objection for such a length of time. In *Ex parte Maxwell* (*a*), Lord *Kenyon* refused to interfere where the annuity had been paid for more than six years after the death of the grantee: he said, "I know not where such a mischief is to stop, if this could be permitted. This may be the only provision made for the younger branches of a family. The legislature, for the safeguard of the subject in their personal dealings with each other, have thought it wise to pass a statute of limitation to personal actions. I know not why that should be disregarded in this more than in other instances." And in *Barber* v. *Gamson* (*b*), *Holroyd* J. said, "In a proceeding on a penal clause, it ought clearly to appear that the practices have been such as clearly to shew, on the part of the grantee or his agent, some misconduct which has been prejudicial to the grantor."

Here, it is true, the annuity has been paid only five years: but one of the parties is dead; and, after all, it comes to a question of fact, on which *Gurney* and *Brown* make different statements; in which case, according to the ordinary practice, we must take the last affidavit as an answer.

That brings me to the fifth objection, that the deed states the consideration to have been paid in notes and sovereigns, the memorial, in notes only.

At this distance of time, that would be a subtle objection on which to vacate the grant of an annuity; but we must allow it, if it rests on sufficient ground. Now, the

(*a*) 2 *East*, 85. (*b*) 4 *B. & Ald.* 281.

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deed must have been prepared before the parties met to execute it; and, at the time the deed was prepared, a doubt perhaps, existed in the mind of the draftsman, whether the money would be paid in notes or sovereigns: he adapts the language of the instrument to either event, and, without further examination, the deed is executed. But notwithstanding such an expression in the deed, is there any rule which prevents the parties from shewing how the money was actually paid? I know of none, and I can see no objection to their showing that it was paid in notes.

The last objection is, that the deed contains a charge on the rectory. No doubt, such a charge cannot be supported; but the circumstance that such a charge is inoperative will not avoid those parts of the deed which are good; nor can we, because the deed contains such a charge, set aside the warrant of attorney; because many cases have decided that the warrant of attorney is objectionable only where it contains an express reference to a sequestration, but legal where it refers only to other modes of execution. I think, therefore, that this rule should be discharged with costs.

PARK J. I am of opinion that the charge on the rectory, although it cannot be supported, does not avoid the other parts of the deed. And as to the warrant of attorney, two recent cases expressly point at the distinction on which we now act. In *Flight* v. *Salter* (*a*), the warrant of attorney expressly authorized the party to proceed by way of sequestration, and the warrant was held void; while in *Newland* v. *Watkin* (*b*), a party who held a warrant of attorney without such a clause was held entitled to set aside a judgment entered up by another creditor under a warrant containing the clause.

(*a*) 1 *B.* & *Adol.* 673. (*b*) 9 *Bingh.* 113.

With

With respect to the omission to specify in the memorial the covenant to pay the premium on the policy, *Morris* v. *Jones* is a case expressly in point.

So, upon the question of fact; *Mootham* v. *Howe* (*a*), and *Ex parte Maxwell*, are decisive to shew the caution with which the Court ought to proceed after an annuity has been paid so long, and one of the parties has ceased to live. In *Mootham* v. *Howe*, where the application to set aside an annuity was made eleven years after the grant, the Court said, "The time of the statute of limitations, too, is passed, and that gives them a *quietus*." And in *Ex parte Maxwell*, Lord *Kenyon* was indignant at the application being made so long after the death of the grantee.

The objection as to notes and sovereigns is too trumpery to merit any observation. I think the rule should be discharged with costs.

BOSANQUET J. I am of the same opinion. Upon the result of the affidavits, it appears that *Gurney* proposed to raise a sum of 800*l*., and was content to grant for it an annuity of 80*l*.: that, to prevent disputes, the grantee offered to give 720*l*. and to pay all the expenses; but to secure the keeping up of a policy of assurance on *Gurney*'s life, which was assigned as a collateral security, it was agreed that the grantee should covenant to pay the annual premium on the policy, and that the annuity should therefore be increased by the amount of the premium, 33*l*. 19*s*. 6*d*., making in the whole 113*l*. 19*s*. 6*d*.

That gets rid of the objection that the amount of the consideration has not been truly stated in the memorial, and that a part of the consideration was retained.

(*a*) 7 *Taunt*. 596.

And

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And I cannot think that the covenant to pay the premium comes within the meaning of the *pecuniary* consideration required by the statute to be specified in the memorial.

As to the alleged variance between the deed and the memorial on the mode of payment by notes or sovereigns, the consideration, as actually paid, *is* truly stated in the memorial. The objection, therefore, must be founded either on the 2d or the 4th section of 53 *G.* 3. *c.* 141. Now the second section requires that the memorial shall state the pecuniary consideration for the grant, but does not provide for the case of any error in the deed. The fourth requires that if any part of the consideration be received in goods, it shall appear on the memorial. But there is no pretence to say that any part of the consideration here was received in goods. There can be no ground therefore for yielding to such an objection.

The charge on the rectory, though not sustainable, does not affect the rest of the instrument, because it is independent of the grant of annuity; and as to its not affecting the warrant of attorney, *Newland* v. *Watkin* is a case in point. It does not follow that an illegal use will be made of an instrument in which the power of sequestration is not referred to; but where such a power is expressly mentioned, it may be presumed that the party will avail himself of it.

ALDERSON J. I am of the same opinion. The first, second, third, and fifth objections resolve themselves into one, namely, that the consideration is not stated in the memorial in the way required by the statute. But the statement required by the statute is a statement of the *pecuniary* consideration for the annuity; and I am of opinion that this covenant to pay the premium of the policy of the insurance does not fall within the meaning of a pecuniary consideration. And there is good reason

why

why the statute should distinguish between the various considerations, and not load the memorial with more than is necessary to give that clue to the entire contents of the deed which, according to *Crowther* v. *Wentworth* (*a*), it was the object of the legislature to attain. "By the fifth section of 53 *G.* 3.," says *Bayley* J., "the grantee of the annuity may obtain a copy of the deed of grant, and he may thereby be furnished with a full description of it, provided he be enabled by the information required by the second section to obtain that copy at the public office."

With respect to the alleged discrepancy between the statement of payment in notes and sovereigns, and of payment in notes only, in most deeds the manner in which the pecuniary consideration is paid does not appear. In that, the memorial is required to be more explicit; but it is sufficient if the statement in the memorial be according to the fact.

The fourth objection is answered on the affidavits. The sixth applies to the charge on the rectory, with respect to which I agree with the rest of the Court. In *Mouys* v. *Leake* (*b*), where in a deed of grant of rent-charge out of a benefice, the grantor also covenanted personally to pay the rent-charge or annuity, and gave a warrant of attorney to confess judgment as a collateral security for payment, the Court refused to order the deeds to be delivered up to be cancelled.

Rule discharged with costs.

(*a*) 6 *B.* & *C.* 366. (*b*) 8 *T. R.* 411.

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Jan. 29.

COOPER *v.* LEAD SMELTING COMPANY.

Upon an issue under the interpleader act, where money is paid into Court to abide the event, the successful party is not allowed to take the money out of Court after verdict and before judgment.

THIS was an issue directed by the Court under the Interpleader Act. The company had paid the monies into Court to abide the event. A verdict having been given for the Plaintiff, before judgment was signed,

Jones Serjt. applied for the money to be paid out of Court, stating that, in general, on feigned issues judgment is not entered.

Sed per Curiam. The rule cannot be granted in this case till judgment has been signed on the feigned issue. The object of the proceeding is to secure in future the company (who are ready to pay the money to either of the two claimants) from the adverse claims of both parties to the issue. By the second section of the Interpleader Act the judgment is made final and conclusive. Till judgment is signed the company are not completely secured from a future demand by the assignees who have failed in the issue; and, therefore, until that period, the money cannot be paid out of Court.

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The demandant having omitted to set forth his pedigree upon the count in a writ of right, the Court refused to allow him to amend, even upon an affidavit of merits, and that the omission had been occasioned by the oversight of an experienced pleader at the bar.

THIS was a writ of right, in which the demandant counted as nephew and heir of the ancestor last seised, without deducing his pedigree, and shewing *how* he was heir. An omission which has been held fatal. *Slade* v. *Dowland.* (*a*)

Stephen Serjt. moved to amend the count in this respect upon an affidavit that the omission was occasioned by the oversight of an experienced pleader at the bar, who had been employed to draw the count, and who, from the infrequency of proceedings by writ of right, was not aware of the necessity of setting out the demandant's pedigree upon the face of the count.

There was also an affidavit as to the nature of the demandant's title, who, it was alleged, had commenced proceedings as soon as he could, and sought to disturb a possession of no more than thirty years duration.

The Court referred to *Dumsday* v. *Hughes* (*b*), where a similar application had been rejected, and to the uniform practice of this Court to refuse amendments in writs of right; but

Stephen referring to *Webb* v. *Lane* (*c*), where a blank was allowed to be filled up with the word *esplees*, and to *Goore* v. *Goore* (*d*), where *Wood* B. in the Common Pleas of *Lancaster* allowed the demandant to insert the word *right*, which had been omitted in the count; and being urgent that the principle of the decisions against amendment should be reconsidered; the Court with some reluctance granted a rule *nisi*.

(*a*) 2 *B.* & *P.* 577.
(*b*) 3 *B.* & *P.* 453.
(*c*) 5 *Bingh.* 285.
(*d*) *Roscoe, Real Act.* 179.

Goulburn

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Goulburn Serjt., who shewed cause, relied on the uniform practice of this Court to refuse amendments in writs of right, and referred to *Dumsday* v. *Hughes*, *Charlwood* v. *Morgan* (*a*), *Hull* v. *Blake* (*b*), *Adams* v. *Padway* (*c*), and *Tooth* v. *Bodington* (*d*) in support of that proposition. In *Webb* v. *Lane* the tenant had improperly signed judgment for a mere blank in the count, which might be ascribed to a clerical error; and *Goore* v. *Goore* was decided in an inferior court, contrary to *Slade* v. *Dowland* (*e*), a decision by Lord *Alvanley* and the whole of this Court.

Stephen Serjt. contended at considerable length, and with much instance, that the principle on which amendments were refused in writs of right could not be sustained. It might be expedient that the practice of interfering with long possession by writs of right should be abolished by the legislature; but as long as it was permitted to form a part of the law, the Courts were bound to view it in the same light as any other legal proceeding. It could not be correct to say that the Courts favoured or discountenanced any legal course of proceeding; the same justice must be administered in all; and if amendments were allowed in personal actions, they ought equally to be allowed in real. The Courts could not discriminate between rights established by law, but were bound to give equal effect to all; and it would in any case be contrary to the principles of justice that a suitor should fail from the ignorance or inadvertence of his professional adviser.

The decisions in *Webb* v. *Lane*, and *Goore* v. *Goore*, shewed that, at least, the practice had not been uniform; and in *Dumsday* v. *Hughes* the Court expressly refused

(*a*) 1 *N. R.* 64.
(*b*) 4 *Taunt.* 572.
(*c*) 1 *Marsh.* 602.
(*d*) 1 *Bingh.* 208.
(*e*) 5 *B. & P.* 577.

to

to amend on account of the insufficiency of the affidavit on which the amendment was prayed. Here the affidavit shewed that there had been no laches on the part of the demandant, and the Court would not punish him for a mistake which he had no means of avoiding.

TINDAL C. J. I have always understood it to be an established rule of this Court, that after an error pointed out, a writ of right is not allowed to be amended. It was so considered by Serjeant *Williams*, whose work is now esteemed a text book of our law, and it is not to be said that this rule has been established on an erroneous principle.

The objection to permitting an amendment in such cases is twofold: one is, that it would tend to relax that vigilance which ought always to attend the assertion of contested claims; for it is essential to justice that the claimant should, if possible, come to the Court within such time as his opponent may reasonably be expected to be furnished, if at all, with the evidence on which he may defend his right. The other objection arises on the peculiar form of a writ of right, in which the tenant can often take no other course than that of joining the mise upon the mere right; in that case he he must begin, expose his whole title, which the claimant, having thus obtained a knowledge of, may come the next year prepared to claim such portion of the property as may appear to him to be the least secure. The proceeding, therefore, is one which has no claim to favour.

I look now at what has been done on these occasions by successive judges, and I find that this application has been uniformly rejected.

In *Dumsday* v. *Hughes* (*a*) the amendment sought was precisely the same as on the present occasion. Lord

(*a*) 3 *B.* & *P.* 453.

Alvanley

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Alvanley then presided in this Court; a judge well versed in the law of real property, and who, from his connection with courts of equity, might be supposed rather to lean to applications of this nature than to entertain a disposition to resist them; and yet the Court discharged the rule, although, as in the present case, there was an affidavit in support of the amendment.

In *Charlwood* v. *Morgan* (*a*) the Court refused to allow the demandant, in a writ of right, to amend the mistake of a Christian name in the count, though an affidavit, accounting for the mistake, was produced, or to discontinue the suit. And *Mansfield* C. J. said, "Had not this been a proceeding by writ of right, the Court would have been willing to amend the mistake which has arisen, and into which the most careful pleader might have fallen. But, considering the nature of this proceeding, how much it has always been discouraged, how much tenants have been permitted to avail themselves of every advantage to defeat the claims of demandants, I am of opinion that, unless some precedent for such an amendment can be produced, the soundest exercise of our discretion will be not to allow the amendment. Every one knows the consequence of overturning titles which have been supposed to exist for near sixty years. Many great purchasers consider sixty years' possession as the best title which can be made, and it has often been lamented by eminent lawyers that the period has not been shortened, who thought that sixty years was too long a time for titles to remain *in dubio*." *Heath* J. said, "I am of the same opinion. In *Dumsday* v. *Hughes* we thought that writs of right ought not to be encouraged, and that the least slip was fatal to the demandant. We did not choose to say, at that time, that in no case what-

(*a*) 1 *N. R.* 64.

ever

ever would an amendment be allowed, since a fit case might, by possibility, be brought before us. The mistake here is only a common mistake, and not such as entitles the demandant to any favour."

In *Hull* v. *Blake* (*a*), where, in a writ of entry *sur disseisin en le post*, the disseisor was described as *Nicholas Stead, the elder*, and it appeared he had a father of the same name living, the Court refused to strike out the words "*the elder*," notwithstanding an affidavit that the disseisor had a son named *Thomas*, and that the mistake had been occasioned by its being supposed his name was *Nicholas*.

Next came the case of *Adams*, demandant, *Radway*, tenant (*b*); in which the Court refused leave to quash a writ of summons, on the ground that no previous notice of executing it had been served on the tenant's attorney; and *Gibbs* C. J. said, "The rule which has been adopted on consideration is, that as a writ of right generally seeks to disturb a possession which has continued for a considerable length of time, the Court will not assist the demandant in getting over any difficulties that may occur to him." And the rest of the Court concurred in the opinion of the Chief Justice, *Heath* J. observing, "that it was in general a very vexatious proceeding."

In *Tooth* v. *Boddington* (*c*) the Court discharged a judge's order, under which the demandant sought to amend his count by substituting a claim of copyhold for a claim of freehold.

Then comes the only case in which the application has been acceded to, namely, *Webb* v. *Lane* (*d*). There, a blank had been left in the count for the word *esplees*, which the Court afterwards permitted the demandant to insert. But in that case the tenant had taken the

(*a*) 4 *Taunt.* 572.
(*b*) 1 *Marsh.* 602.
(*c*) 1 *Bingh.* 208.
(*d*) 5 *Bingh.* 285. *S.C.* 2 *M.* & *P.* 478.

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law into his own hands, and, instead of demurring, signed judgment. The Court thought the irregularity was not such as to entitle the party to sign judgment; and upon hearing counsel on both sides, allowed the blank to be filled up with the word *esplees*. But this was only in furtherance of the old mode of pleading *ore tenus*, in which, if the prothonotary had come to an expression which occasioned him a difficulty, the Court would have assisted their officer in supplying the word for which he might be at a loss.

Here, then, we have a uniform current of authorities n which the Court has refused to allow amendment in a writ of right. Is there any thing in the present case to distinguish it from those authorities? The affidavit in support of the amendment discloses no more than appeared upon the record in *Charlwood* v. *Morgan*; nothing inevitable; no fraud on the part of an opponent; nothing more than that the pleader made a mistake; and what is that but the mistake which was made by the pleader in *Charlwood* v. *Morgan*? As to the affidavits touching the demandant's title, we cannot, on a motion like this, enter into the title or the state of the equities between the parties, but must decide according to the general rule of the Court applying to such an occasion. I think the present rule should be discharged.

PARK J. I am of the same opinion, and am satisfied with the reasons adduced by the Chief Justice for refusing to amend in writs of right. Men ought not to be lightly disturbed in their possessions after thirty years enjoyment, and it is hard that, in such a case, they should be compelled to produce their title, putting it in the power of any stranger to pick a hole in it. With respect to the decisions, it ought to be remembered that Lord *Alvanley* was assisted by Mr. Justice *Heath*, who possessed great knowledge in this branch of law, and

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that Sir *James Mansfield* was assisted by Mr. Justice *Heath*, and also by Mr. Justice *Chambre*, another eminent lawyer. We have then, decisions in the time of Sir *Vicary Gibbs*; and the more recent case of *Tooth* v. *Boddington*, which is an exceedingly strong one, shews that, to the latest period, the opinion of the Court has remained unchanged. It would be arrogance in us to presume that such a long course of decisions is wrong, and to overturn at once the uniform course of practice. *Webb* v. *Lane* is totally different from the present case, because the tenant there, *proprio motu*, entered up judgment on a record which did not entitle him to it, and the Court was bound to set the judgment aside. As to the case before Mr. Baron *Wood*, in the Common Pleas of *Lancaster*, it is well known that that learned Baron had always a bias on the subject of amending writs of right.

BOSANQUET J. This amendment could not be allowed without reversing the settled practice of this Court for many years. I speak from personal experience of it since the year 1797. It has been contended that if amendments are permitted in personal actions, and the law allows the proceeding by a writ of right, the Courts should extend the same facilities on both occasions. I cannot accede to that proposition. The principle of this Court has always been that a party who resorts to this species of remedy must come prepared in every way; and if he fails, the Court will not assist him. The only case in opposition to that principle is the case in the Common Pleas of *Lancaster*; but the guide to the practice in writs of right is to be taken from the decisions of the Common Pleas at *Westminster*; and though that Court has not said that it will never permit an amendment, it has said that it will not amend in such a case as this. *Dumsday* v. *Hughes* is not to be distin-

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guished from the present case; and in some other of the cases the application was in effect the same as upon the present occasion, to introduce a step omitted. As to the decision in the Common Pleas of *Lancaster*, although Mr. Baron *Wood* was assisted by Mr. Justice *Bayley*, I cannot but express my surprise at an amendment by which the demandant was permitted to insert the word *right*, because in *Slade* v. *Dowland* (*a*) Lord *Alvanley* said he considered the omission of that word as a fatal objection, and Mr. Justice *Bayley*, when a serjeant, was one of the counsel in *Charlwood* v. *Morgan*. But it is well known that Mr. Baron *Wood* entertained, on the subject of writs of right, notions very different from those which this Court has sanctioned.

With respect to the affidavit in the present case, it presents nothing which entitles the demandant to a more favourable consideration than was obtained in the case of *Charlwood* v. *Morgan*. If in *Webb* v. *Lane* a blank was left for the word *esplees*, perhaps because it was not legible in the draft, that might be a case in which the Court ought to interfere to assist the demandant; but it is a case clearly distinguishable from the present.

ALDERSON J. I am of the same opinion. The tenant in a writ of right, is obliged to begin, and to expose his title to his opponent: this is a hardship; but it is some compensation that the demandant is bound to shew his pedigree on the face of the count. "It is an established rule," says Serjt. *Williams*, (*a*) "that in all real actions brought by an heir on the seisin of his ancestor, the demandant must show *how* he is heir; — he must set forth specially in what manner; — and that too with accuracy and correctness, otherwise it will be bad on demurrer or after judgment for the demandant, by default or on demurrer."

(*a* 2 *B. & P.* 577. (*b*) 2 *Wms. Saund.* 45. *a.* *n.* 4.

murrer." And the rule is established on the plainest principles of equal justice. Here the demandant has failed to observe the established rule, and having failed to observe it, has equally failed to make out a favorable case for amendment. On the contrary it has been the uniform course to refuse amendment in cases more favorably circumstanced; and whatever may be our private opinion, it is better to adhere to precedents where the matter is not *res integra*. I concur in thinking that this rule ought to be discharged.

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Rule discharged.

KNIGHT *v.* BROWN.

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A VERDICT was found for the above named Plaintiff upon the fifth count of the declaration in this cause, *assumpsit*, for the use and hire of divers horses and carriages by the Defendant; and a verdict for the Defendant upon all the remaining counts contained in the declaration, namely, upon four special counts for damage done to a horse, carriage, and harness of the Plaintiff, through the negligence and improper conduct of the Defendant, as was alleged and set forth in those counts, and upon the remaining common counts, for work and labour, materials found and provided, and the usual money counts: and the *postea* was entered accordingly. The plea, was the general issue.

Upon a declaration in *assumpsit* of several counts, to which the general issue is pleaded, and a verdict is found on one count for the Plaintiff, and on the remaining counts for the Defendant, the Defendant is entitled, under the rule *Trin.* 2 *W.* 4., to have the costs of the counts found for him deducted from the Plaintiff's costs.

Upon the taxation of the Plaintiff's costs, it was contended that the Defendant was entitled to have deducted from the Plaintiff's costs the Defendant's costs incurred upon the counts found for the Defendant, inasmuch as every count in the declaration was by the plea of general issue, made an issue of itself, and therefore came within

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the rule of Court in that behalf. The prothonotary having refused to allow the Defendant the costs of the counts found for him as above,

Coleridge Serjt. obtained a rule *nisi* for a review of the taxation, which

Wilde Serjt. opposed, contending that within the meaning of the seventy-fourth rule *Trinity*, 2 *W.* 4. no distinct issue had been raised on these counts; but

The Court thought otherwise, and the rule for a review of the taxation was made

Absolute.

Where money is paid after suing out process to recover it, the Defendant, before he pays, knowing the cause of action for which the writ is sued out, and there being no fraud on the part of the Plaintiff, no action is maintainable to recover such money back.

THIS was an action for money had and received, in which the Plaintiffs sought to get back a sum paid, as they alleged, to the Defendant by mistake, in the course of some transactions arising out of a charter-party. It appeared, however, upon the trial of this cause, that the payment in question was made by the Plaintiffs after, and in consequence of the issuing of a writ against them for the amount. The payment was proved to have been made in the month of *May* 1827, after process had been issued against the Plaintiffs, in the month of *April* preceding, for the purpose of recovering this very sum, and after an appearance entered to such process. Before the writ was issued, the Defendants in that action (the present Plaintiffs) had received letters addressed to each of them, stating the intention to sue for the money now in question, in terms sufficiently explicit,

plicit, to call their attention to the subject in dispute; after which, the money claimed in that action was paid.

But the jury having found a verdict for the Plaintiffs, and also, that the payment had been made without knowledge or reasonable means of knowledge of the facts on which the demand had proceeded,

Jones Serjt, obtained a rule *nisi* to set aside the verdict as contrary to evidence, and also, because the Plaintiffs having paid the sum in question under legal process, were, by that circumstance, estopped from suing to recover it back. *Marriott* v. *Hampton* (*a*), *Brown* v. *M'Kinally.* (*b*)

Wilde Serjt. who shewed cause, after attempting to reconcile the verdict with the evidence, observed, that in *Marriot* v. *Hampton*, the Plaintiff sought to recover back money which he had paid under a judgment entered upon a cognovit: here the Plaintiffs had paid upon mesne process, and according to the finding of the jury had paid without knowledge, or means of knowledge of the propriety of the demand. They were not estopped therefore by any judgment of the Court, and the mere circumstance of payment after process was no recognition of the justice of the suit. In *Cobden* v. *Kendrick* (*c*), an objection was taken at the trial, that that action was in effect to put the same sum in litigation a second time, which had been recovered in the former action by *Kendrick* against *Cobden*; but Lord *Kenyon* overruled the objection, on the ground that the money had been paid under a compromise, and not under the judgment of a court.

(*a*) 7 *T. R.* 269. (*b*) 1 *Esp.* 279. (*c*) 4 *T. R.* 432.

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HAMLET v. RICHARDSON.

Jones and *Bompas* Serjt., in support of the rule, observed that in *Cobden* v. *Kendrick*, the Defendant had been guilty of fraud.

Cur. adv. vult.

TINDAL C. J. Upon the motion to set aside the verdict for the Plaintiffs in this case, two points have been made; first, that the verdict is against evidence; and secondly, that the payment made by the Plaintiffs was a payment made after, and in consequence of the issuing of a writ against them, and being a payment under compulsion of legal process, the money paid cannot be recovered back. As to the first point, after full consideration of the evidence in the cause, we think the jury have not drawn a right conclusion from the facts proved before them; but we hold it better not to enter into a discussion upon the particular facts, in order that the case may be laid before a second jury with the least possible prejudice against either party.

The consideration of the second point becomes therefore unnecessary; but as it may be important for the Plaintiffs to be acquainted with the opinion we have formed upon the law, as it applies to the facts given in evidence on the former occasion, in order to regulate the course of their future proceedings, we shall state shortly such opinion. The payment was proved to have been made in the month of *May* 1827, after process had been issued against the Plaintiffs in the month of *April* preceding, for the purpose of recovering this very sum, and after an appearance entered to such process. Before the writ was issued the Defendants in that action (the present Plaintiffs) had received letters addressed to each of them, stating the intention to sue for the money now in question, in terms sufficiently explicit, to call their attention to the subject in dispute; after which the

money

money claimed in that action was paid. We think this money was paid under compulsion of legal process. In *Marriott* v. *Hampton*, it does not appear to what precise point the action had been carried before the money was paid, though, from the circumstance of a cognovit having been given for the costs, it is probable the declaration had been delivered. But the judgment of the Court is expressed in very general terms, namely, that "after a recovery by process of law, there must be an end of litigation." In *Brown* v. *M'Kinally* (*a*), the payment made by the Plaintiff in the former action, which had been brought against him by the Defendant, was a payment made after action brought, but in what stage of the action does not appear. Lord *Kenyon* held the action not maintainable, for that to allow it, would be to try every such question twice. In *Milnes* v. *Duncan* (*b*), Mr. Justice *Holroyd* says, "if the money had been paid after proceedings had actually commenced, I should have been of opinion that, inasmuch as there was no fraud in the defendant, it could not be recovered back." And as to the case of *Cobden* v. *Kendrick*, if it can be supported as to this point, we think it can only be so on the ground of fraud in the Defendant. We think the rule of law is accurately laid down by Mr. Justice *Holroyd*; and that, as the money was paid in this case after the suing out process to recover it, the Defendants in the former action knowing the cause of action for which the writ was sued out before they paid the money, and there being no fraud on the part of the Plaintiff in that action, it appears to us, that no action is maintainable to recover it back. The rule for a new trial must therefore be made absolute on payment of costs.

Rule absolute.

(*a*) 1 *Esp.* 279. (*b*) 6 *B & C.* 679.

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ROBSON and Others *v.* ROLLS and Another.

If a trader, from the dread of an arrest, abstains from going to a place to which he would have gone but for such dread, he thereby commits an act of bankruptcy by "absenting himself with intent to delay creditors."

THE Plaintiffs sued as assignees of *George*, a bankrupt, to recover money alleged to have been paid by him to the Defendants by way of fraudulent preference.

The validity of the commission was disputed by the Defendants, on the ground that *George* had committed no act of bankruptcy; as to which, it appeared that *George* being apprehensive that a creditor of the name of *Green*, who had signed judgment against him, would take out execution thereon against his person, was desirous to ascertain whether a *ca. sa.* had been issued against him by *Green*, before he, *George*, returned from the city to his own house in *Middlesex*. And for that purpose he came to the lower end of *Chancery Lane*, which is in *London*, and beckoned to *Whitaker*, the assistant of the officer of the sheriff of *Middlesex*, who was at the sheriff's office, which is situated higher up *Chancery Lane*, to come to him where he then stood, in order that he might make that enquiry. *George*, at the time believed that the sheriff's officer was in the county of *Middlesex*, and he stated to the officer, that his motive in procuring the officer to come to him, instead of going himself to the officer, was to avoid being arrested at the suit of *Green*, in case *Green* had sued out a *ca. sa.* The officer accordingly came to *George*, and informed him, as the fact was, that *Green* had not then sued out any execution upon his judgment.

George repeated the enquiry at several different times, until he was told by the officer that *Green*'s execution was a *fi. fa.* *Tindal* C. J., before whom the cause was tried, thought that this did not amount to an act of bank-

bankruptcy; and a verdict having been found for the Defendants,

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Wilde Serjt. moved to set aside this verdict, for a misdirection as to the alleged act of bankruptcy.

In order to constitute an act of bankruptcy "by absenting himself," it is not necessary that a writ should be in the hand of the officer whom the trader avoids, nor that any creditor should be actually refused or delayed; it is sufficient, if from fear of meeting a creditor or the sheriff's officer, the trader abstains from going to a place to which he would otherwise have gone. *Robertson* v. *Liddell* (*a*), *Dudley* v. *Vaughan* (*b*), *Chenoweth* v. *Hay* (*c*), *Gillingham* v. *Laing*. (*d*) The consequence of the act is not looked to; its character, as an act of bankruptcy, is derived alone from the motive by which the trader is actuated. In *Chenoweth* v. *Hay*, the sheriff's officer, whose appearance was the cause of alarm, had no writ against the trader who retreated from his front room; and in *Gillingham* v. *Laing*, the forbearing to go to the Royal Exchange, which the trader had previously frequented, was held to be an act of bankruptcy. And, recently, in *Green* v. *Marshal* (*e*), Lord *Tenterden* held at *Nisi Prius*, on a state of facts in no wise differing from those of the present case, that the conduct of the trader amounted to an act of bankruptcy.

A rule *nisi* having been granted,

Jones Serjt. shewed cause. No reported case has gone so far as the present: and no trader will be safe, if the abstaining to visit a place in which he has no engagement with a creditor, is to be deemed an act of bankruptcy. The motive alone is not sufficient to constitute

(*a*) 9 *East*, 487.
(*b*) *Id.* 491.
(*c*) 1 *M.* & *S.* 676.
(*d*) 6 *Taunt.* 532.
(*e*) Not reported.

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an act of bankruptcy; the motive must be followed by an act which either delays, or has a tendency to delay, some creditor. A mere omission to go in an intended direction is not sufficient, where no engagement is broken and no creditor delayed. In *Chenoweth* v. *Hay*, the trader actually fled from his shop, and concealed himself in a back room. In *Gillingham* v. *Laing*, he violated an engagement to meet a creditor at the Royal Exchange, and the creditor was delayed accordingly. In *Bernasconi* v. *Farebrother* (*a*), it was held that a trader does not commit an act of bankruptcy by absenting himself, unless he absents himself from his place of abode, or place of business, or from some particular creditor.

And in *Fisher* v. *Boucher* (*b*), where a trader being under apprehension of arrest, gave directions to his servant to deny him in case *A.*, a sheriff's officer, called, it was held that the sheriff's officer not having called, that, of itself, was not any evidence of a beginning to keep house. And the Court inclined to think that in order to constitute an act of bankruptcy by departing from the dwelling-house, the departure must be with an *absolute* intent to delay creditors. But if it were only with intent to delay creditors in case a particular event occurred, and that event did not occur, it was not an act of bankruptcy.

Wilde. In *Bernasconi* v. *Farebrother* there was no intention to delay creditors, the trader at the time he was absent having long ceased to be in business. In *Fisher* v. *Boucher* the trader did not follow up the direction to his servant to deny him by retiring to a part of the house which he did not usually occupy, so that there was no evidence of a beginning to keep house with intent to delay creditors; and as to the departure, it did not take place with an absolute, but only with an

(*a*) 10 *B.* & *C.* 549. (*b*) *Id.* 705.

inchoate

inchoate or conditional intention to delay creditors. In the present case the trader abstained from going into *Middlesex* with an absolute intention to delay his creditor.

Cur. adv. vult.

TINDAL C. J. The principal question in this case is, whether the facts proved at the trial with respect to the transaction between *George* and the sheriff's officer amounted to an act of bankruptcy? The facts were these: *George* being apprehensive that a creditor of the name of *Green*, who had signed judgment against him, would take out execution thereon against his person, was desirous to ascertain whether a *ca. sa.* had been issued against him by *Green* before he returned from the city to his own house in *Middlesex*; and for that purpose he came to the lower end of *Chancery Lane*, which is in *London*, and beckoned to *Whitaker*, the assistant of the officer of the sheriff of *Middlesex*, who was at the sheriff's office, which is situated higher up *Chancery Lane*, to come to him where he then stood, in order that he might make this enquiry. *George* at the time believed that the sheriff's office was in the county of *Middlesex*, and he stated to the officer that his motive in procuring the officer to come to him, instead of going himself to the office, was to avoid being arrested at the suit of *Green*, in case *Green* had sued out a *ca. sa.* The officer accordingly came to *George*, and informed him, as the fact was, that *Green* had not then sued out any execution upon his judgment. *George* repeated the enquiry at several different times, until he was told by the officer that *Green*'s execution was a *fi. fa.*

At the trial of this cause at *Westminster*, I thought, at the time that the case fell within the principle laid down by the Court of King's Bench in *Fisher* v. *Boucher* (*a*), as being only an intent to delay a creditor

(*a*) 10 *B.* & *C.* 705.

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in case a particular event had occurred, (namely, in case *Green* had actually sued out a *ca. sa.*) which event had not taken place. But, upon further consideration of the cases which have been brought before us in argument, I am satisfied, and my learned Brothers agree with me, that my first impression was wrong; and that the forbearing to go into the county of *Middlesex*, where he would have gone for the purpose of making this enquiry but from the dread of being arrested, falls within that class of acts of bankruptcy which are grounded upon the words of the statute, "if he shall otherwise absent himself with intent to delay creditors." In fact, the stopping at the end of *Chancery Lane*, and abstaining from entering it, was as much an act done, as if he had gone off for the same purpose in a different direction. It was not a mere intention to do an act, which intention was afterwards laid aside in consequence of information received before it became necessary to do it, which formed the ground of decision in the case last referred to. If the officer of the sheriff of *Middlesex* had actually had a warrant against *George* at the time of this transaction, the causing the officer to come into *London*, where the warrant would have been inoperative, instead of going to the officer in *Middlesex*, would have been absenting himself within the principle laid down by the decided cases, whereby an actual delay of the creditor would have been occasioned, and would therefore have been an absenting himself "with intent to occasion such delay." And the circumstance that the officer had no warrant, but was only supposed to have a warrant, makes no difference, according to the doctrine laid down by Lord Chancellor *Eldon* in *Ex parte Bamford.* (*a*)

But it is urged, on the part of the Defendants, that

(*a*) 15 *Ves.* 449.

as

as the case went to the jury on the question whether these bills of exchange were delivered to the Defendants in contemplation of bankruptcy, and to give them a fraudulent preference, and the jury have negatived the fraudulent preference, there can be no use in sending the cause to a second trial, for that this transaction must be protected under the eighty-second section of the bankrupt act, as a payment "really and *bonâ fide* made by the bankrupt before the commission, not being a fraudulent preference." But we think it enough to say, that the precise point which now arises, viz. whether this payment, *after* a previous act of bankruptcy, was or was not a real *bonâ fide* payment, not being a fraudulent preference, has not been submitted to the consideration of the jury, and that the Plaintiffs have the right to have their opinion upon that fact. We therefore think the rule for a new trial should be made absolute.

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Rule absolute.

BASSETT *v.* DODGIN and Others.

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THIS was an action brought by the Plaintiff to recover the amount of two bills of exchange drawn by *Joseph Francis Taylor* on, and accepted by, *George Daniel*, indorsed by *Taylor* to the Defendants, and indorsed by the Defendants to the Plaintiff. The bills became due in the month of *August* 1831.

The Defendants had indorsed these bills for the accommodation.

An accommodation indorser is a person *liable* to pay the bill for the party accommodated; against whom, therefore, if he become bankrupt, such indorser, though not called on to pay the bill till after the bankruptcy, may prove the amount under sect. 52. of 6 *G.* 4. *c.* 16. And the bankrupt being discharged from any suits for the amount by his certificate, is, in an action on the bill, a competent witness for such indorser.

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commodation of *Taylor*, and to enable him to raise money by procuring them to be discounted, for the purpose of taking up a former bill then due, of which they were the acceptors, for his accommodation. *Taylor*, who was called by the Defendants as a witness to prove usury, stated upon the *voir dire* that he had been bankrupt, and had obtained his certificate; and it was thereupon contended by the Defendants that the witness was discharged from all liability over to the Defendants, both as to the principal debt and the costs, inasmuch as the Defendants might have proved, and might still prove the amount of both bills under the commission against *Taylor*, by virtue of the fifty-second section of the bankrupt act; and consequently that *Taylor*'s certificate would be a bar to any action against him.

The Defendants had been called on to pay the bills after *Taylor*'s bankruptcy.

It was objected, by the Plaintiff's counsel, that he was an interested witness, because the Defendants would be entitled to recover against him, not only the amount of the bill, but the costs of this action also, while to *Bassett* he would be liable for the bill only. *Jones* v. *Brooke.* (*a*) *Tindal* C. J., before whom the cause was tried, *London* sittings after *Michaelmas* term last, allowed the objection, and *Taylor*'s evidence was rejected.

A verdict having been found for the Plaintiff,

Jones Serjt. moved to set it aside, on the ground that *Taylor* was a competent witness.

At the time of *Taylor*'s commission, *Dodgin* and Co. being indorsers for the accommodation of *Taylor*, were liable to the debt incurred by *Taylor* as drawer of the bill in question; and by 6 *G.* 4. *c.* 16. *s.* 52., "any person who, at the time of issuing the commission, shall be

(*a*) 4 *Taunt.* 464.

surety

surety or liable for any debt of the bankrupt, or bail for the bankrupt, either to the sheriff, or to the action, if he shall have paid the debt, or any part thereof in discharge of the whole debt, (although he may have paid the same after the commission issued,) if the creditor shall have proved his debt under the commission, shall be entitled to stand in the place of such creditor as to the dividends and all other rights under the said commission which such creditor possessed or would be entitled to in respect of such proof; or, if the creditor shall not have proved under the commission, such surety, or person liable, or bail, shall be entitled to prove his demand in respect of such payment as a debt under the commission, not disturbing the former dividends, and may receive dividends with the other creditors, although he may have become surety, liable, or bail as aforesaid, after an act of bankruptcy committed by such bankrupt: provided that such person had not, when he became such surety or bail, or so liable as aforesaid, notice of any act of bankruptcy by such bankrupt committed." *Dodgin* and Co., therefore, might have proved under *Taylor*'s commission, or have stood in the place of the creditor proving for the bill; they are therefore barred by the certificate from any claim against *Taylor*, and he was a disinterested witness. In *Vansandau* v. *Corsbie* (*a*), where the acceptor of an accommodation bill brought an action against the drawer, who had become bankrupt, for not providing him with funds to pay the bill when due, whereby he had incurred the costs of an action, and was obliged to sell an estate, in order to raise money to pay the bill, the certificate was held to be a good bar.

A rule *nisi* having been granted,

Coleridge Serjt. shewed cause. It is not contended that *Dodgin* and Co. were sureties; for, in *Yallop* v.

(*a*) 3 *B. & Ald.* 13. See *Hoffham* v. *Foudrinier*, 5 *M. & S.* 21.

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Ebers (*a*), Lord *Tenterden* says, that *Laxton* v. *Peat* (*b*), where it was held that an accommodation acceptor might be considered as a surety, has been very long overruled; and at the time of the commission they were not liable to pay the bill on account of *Taylor*; they were liable on their own account only. And they might have escaped liability altogether; as if the bill had been paid by the acceptor or drawer. *Dodgin* and Co., therefore, had no claim against *Taylor* at the time his commission issued; it was not certain that they would ever be liable on the bill; and if ever liable, it must have been on their own account: they could not prove, therefore, under *Taylor*'s commission, and are not barred by his certificate. In *Vansandau* v. *Corsbie*, the party held to be barred by the certificate was avowedly an accommodation acceptor, and as such, liable in respect of the drawer at the time the commission issued against him. So in *Wood* v. *Dodgson* (*c*) and *Aflalo* v. *Foudrinier* (*d*), the party barred was, at the time of the commission, expressly liable for the debts of a firm in which the bankrupt had been a partner. But, in *Yallop* v. *Ebers* (*e*), where defendant, on certain considerations, undertook to pay the balance due on a bill of exchange, of which plaintiff was acceptor; and he afterwards, by a new undertaking, engaged to deliver up the acceptance to plaintiff within a month, or indemnify him against it; Defendant became bankrupt, and did not pay or give any indemnity; and plaintiff was obliged to take up the bill, the bankrupt having then obtained his certificate: on action brought by plaintiff for the breach of promise, it was held that he could not have proved in respect of it under the defendant's commission, either for

(*a*) 1 *B. & Adol.* 698.
(*b*) 2 *Camph.* 185.
(*c*) 2 *M. & S.* 195.
(*d*) 6 *Bingh.* 306. *S. C.* 3 *M. & P.* 743.
(*e*) 1 *B & Adol.* 698.

a debt

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a debt not payable at the time of bankruptcy, or for a contingent debt, or in the character of a surety; and, therefore, that the bankruptcy was no defence.

The case of bail is introduced into the new act, and the present liability of the indorsee is precisely like that of bail, and is not provided for by the act.

Jones. No distinction can be drawn between an accommodation acceptor, and an accommodation indorser. Both are liable on account of the party for whom they have accepted or indorsed, and both are liable on their own account. In *Yallop* v. *Ebers*, the party, who was held not to be barred by the bankrupt's certificate, was himself acceptor for value, and had no claim on the bankrupt, except on an agreement by the bankrupt for certain considerations to pay the balance due on that acceptance, which agreement was holden not to constitute a debt before the certificate. But in *Ex parte Yonge* (*a*), *Eldon* C. said, "The drawer of a bill of exchange is not strictly a surety for the acceptor. In general cases, the acceptor is primarily liable upon the bill; and the drawer may be in the nature of a surety; but, if the real transaction is, that as between them the drawer shall be first liable, after what has passed at law, and here with reference to the acceptor having, or not having effects, I state from a perfect recollection, that when that bill passed, (49 *G.* 3. *c.* 121.,) it was in contemplation, where justice required it, that the acceptor should be considered a person liable for the drawer: but, further, the circumstances of each are to be looked at; and if a person has become liable under this section (*b*) of the act, he is to have relief."

Cur. adv. vult.

(*a*) 3 *Ves.* & *B.* 40. (*b*) Sect. 8.

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TINDAL C. J. The only question in this case is, whether *Taylor*, the drawer and indorser of a bill of exchange, was a competent witness on the part of the Defendants in an action brought against them as subsequent indorsers by the holder of the bill. *Dodgin* and Co. had indorsed this bill for the accommodation of *Taylor*, and to enable him to raise money by discounting it, for the purpose of taking up a former bill then due, of which they were the acceptors, for his accommodation. If the matter had rested there, no doubt *Taylor* would have been incompetent, on the authority of *Jones* v. *Brooke* (*a*); inasmuch as he would be liable as to the costs to the Defendant only, though he stood indifferent both to Plaintiff and Defendant as to the principal debt. But *Taylor* stated upon the *voir dire*, that he had been bankrupt, and had obtained his certificate; and it was thereupon contended by the Defendants that the witness was discharged from all liability over to the Defendants, both as to the principal debt and the costs, inasmuch as the Defendant might have proved, and might still prove, the amount of both under the commission against *Taylor*, by virtue of the fifty-second section of the bankrupt act, and consequently that *Taylor*'s certificate would be a bar to any action against him.

The question therefore is, whether this case falls within the fifty-second section of that statute. That section provides for the case "of any person who at the issuing of the commission shall be surety, or liable for any debt of the bankrupt, or bail for the bankrupt, either to the sheriff, or to the action." Now the Defendants in this case cannot with any propriety be considered as *sureties* for the debt of *Taylor* to the Plaintiff; inasmuch as they are liable primarily and immediately to the holder of the bill as indorsers, that is, as principals, and not merely

(*a*) 4 *Taunt.* 464.

upon

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upon the failure of *Taylor*, the prior indorser. The only question therefore is, whether they come within the meaning of the words "persons liable at the issuing of the commission for any debt of the bankrupt." In *Ex parte Lloyd* (*a*), Lord Chancellor *Eldon* holds expressly that the acceptor, for the accommodation of the drawer, though not surety, is a *person liable* within the act. He states the same opinion again in *Ex parte Yonge*. (*b*) The cases of *Wood and Another* v. *Dodgson* (*c*) and *Aflalo* v. *Fourdrinier*, though distinguishable in some respects from the present, yet lead to the same conclusion. It is said the case of bail is introduced into the new act, and that the present liability of the indorsee is precisely like that of bail, and is not provided for by the act. But it is to be observed, that in the case of bail, there is no debt due from the defendant at the time of the recognizance entered into, and whether there ever will be a debt or not, is contingent and uncertain, until the action in which the bail is given is determined. The bail therefore were not persons *liable for* a debt of the bankrupt at the time of the issuing the commission. Upon the whole, we think *Dodgin* and Co. might have proved the amount of the bill under *Taylor*'s commission, or might even now prove it, immediately after payment of the amount of the bill to the holder; and consequently that the certificate of *Taylor* is a bar to any future action by *Dodgin* and Co. against him after they have paid the bill; and as the case of *Vansandau* v. *Corsbie* puts the costs upon the same footing as the debt, we think *Taylor* is an admissible witness on the part of the Defendants.

Rule absolute.

(*a*) 1 *Rose's Cases in Bankruptcy*, 6.

(*b*) 3 *Ves. & Beames*, 40.

(*c*) 2 *M. & S.* 195.

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Jan. 23.

LYON *v.* WALLS.

To a declaration on a general acceptance of a bill of exchange, Defendant pleaded that the acceptance was qualified, and that according to the statute in such case made and provided, in the acceptance he expressed that he accepted the bill "payable at a certain place only, to wit, No. 32. *Albany Street*, that is to say, *and not otherwise or elsewhere*:" Plaintiff replied that the acceptance was a general acceptance, and that the Defendant did not in the acceptance express "that he had accepted the bill payable at a certain place only, in manner and form as the Defendant had alleged:"

Held, on special demurrer, a sufficient traverse.

Held, also, that the plea should have alleged that no presentment for payment was made at the place appointed.

THE declaration stated that the Plaintiff, on the 2d of *January* 1832, to wit, at *London*, made his bill of exchange in writing, and directed the same to the Defendant, and thereby required the Defendant to pay to the order of him, the Plaintiff, the sum of 17*l.* for value received, two months after the date thereof, which period had then elapsed; and then and there delivered the same to the said Defendant, and the Defendant then and there accepted the same, and promised the Plaintiff to pay the same according to the tenor and effect thereof, and of his acceptance thereof: yet he did not pay the amount thereof, although the said bill was there presented to him on the day when it became due, and thereupon the same was then and there returned to the Plaintiff, of all which the Defendant then and there had notice.

The second count stated, that the Defendant, on the 2d of *April* 1832, was indebted to the Plaintiff in 80*l.*, for the price and value of goods *then and there* sold and delivered by the Plaintiff to the Defendant at his request, and afterwards, on the day and year last aforesaid, at *London* aforesaid, in consideration of the premises, then and there promised to pay the last mentioned sum of money to the Plaintiff on request. Breach, nonpayment.

To the first count the Defendant pleaded, that the said acceptance by the Defendant of the bill of exchange in the first count mentioned, was a qualified acceptance,

and

and that the Defendant did, according to the form of the statute in such case made and provided, in his said acceptance express that he accepted the same payable at a certain place only, to wit, at No. 32. *Albany Street, Regent's Park*, that is to say, and not otherwise or elsewhere; as by the said bill of exchange, reference being thereunto had, would more fully appear; and that he was ready to verify; wherefore he prayed judgment, &c. The Defendant demurred to the second count, assigning for cause of demurrer that it did not contain a sufficient venue.

The Plaintiff joined in demurrer, and to the plea to the first count replied, that the said acceptance by the Defendant of the bill of exchange in the first count mentioned, was a general acceptance, as in that count was set forth, and that the Defendant did not, in his said acceptance, express that he accepted the said bill payable at a certain place only, in manner and form as the Defendant had above in his said first plea alleged.

To this replication the Defendant demurred, assigning for cause, that it did not traverse and put in issue the material fact contained in the first plea, namely, whether the said acceptance was a qualified acceptance according to the form of the statute in such case made and provided, and payable at a certain place only, and *not otherwise or elsewhere*; the full traverse of which said matter so alleged by the Defendant could alone take the said acceptance out of the intent of the said statute; but that the said replication contained only an argumentative averment that the Defendant did not, in his said acceptance, express that he accepted the said bill payable at a certain place only.

Ludlow Serjt., in support of the demurrer, referred to *Bowdell* v. *Parsons* (*a*) as an authority that, upon special

(*a*) 10 *East*, 359.

demurrer

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demurrer at least, the mention of a venue in the first count of a declaration will not cure the omission of it in the second; and with respect to the replication contended, that all the allegations contained in it might be true, and yet the Defendant's acceptance might have contained the words "and not elsewhere," which are the express words prescribed by the statute for qualifying an acceptance, and the only words which can have that effect: *Selby* v. *Eden*. (*a*)

TINDAL C. J. The Plaintiff is entitled to our judgment. As to the alleged omission of venue, one cannot read the second count without incorporating the place where the goods were sold with the existence of the debt at the same time. The count states that the Defendant, on the 2d of *April* 1832, was indebted to the Plaintiff for goods then and there sold by the Plaintiff to the Defendant at his request, and at *London*, in consideration of the premises, then and there promised to pay: in other words,

The Defendant, on the 2d of *April*, promises at *London*, to pay the sum in which he is there indebted for goods sold to him on that day. The debt arises there, and the venue is sufficient.

With regard to the acceptance, the Defendant pleads, "that the acceptance was qualified, and that, according to the statute in such case made and provided, in the acceptance he expressed that he accepted the bill "payable at a certain place only, to wit, at 32. *Albany Street*, that is to say, and not otherwise or elsewhere."

It is not immaterial to observe, that the allegation that the bill was accepted "not otherwise or elsewhere" is not expressly averred by the Defendant, but only pleaded under a *viz.* But the Plaintiff replies, "That the acceptance was a general acceptance, and that the Defend-

(*a*) 3 *Bingh.* 611.

ant

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ant did not, in the acceptance, express "that he had accepted the bill payable at a certain place only, in manner and form as the Defendant had alleged." And he seems to me to incorporate in that traverse the particular mode in which the bill was accepted. I should also go higher, and say, that if this were a qualified acceptance, the act says the acceptor shall not be liable, except on default of payment, after demand, at the place appointed. I should have been better satisfied, therefore, with the Defendant's plea, if he had gone on to say that no demand was made at the place appointed for payment.

The other Judges concurring, the Court gave

Judgment for the Plaintiff.

REGULA GENERALIS.

IT IS ORDERED, That in case a rule of Court or Judge's order for returning a bailable writ of *capias* shall expire in vacation, and the sheriff or other officer having the return of such writ shall return *cepi corpus* thereon, a Judge's order may thereupon issue requiring the sheriff, or other officer, within the like number of days after the service of such order as by the practice of the Court is prescribed with respect to rules to bring in the body issued in term, to bring the Defendant into Court by forthwith putting in and perfecting bail above to the action. And if the sheriff or other officer shall not duly obey such order, and the same shall have been made a rule of Court in the term next following, it shall not be necessary to serve such rule of Court or to make any fresh demand thereon, but an attachment shall issue forthwith

1833. forthwith for disobedience of such order, whether the bail shall or shall not have been put in and perfected in the mean time.

T. DENMAN. J. GURNEY.
N. C. TINDAL. S. GASELEE.
LYNDHURST. J. VAUGHAN.
J. BAYLEY. J. PARKE.
J. A. PARK. W. BOLLAND.
W. E. TAUNTON. J. B. BOSANQUET.
E. H. ALDERSON. J. LITTLEDALE.
J. PATTESON.

MEMORANDUM.

Thomas Noon Talfourd, Esquire, was called to the degree of the *coif*, and gave rings with the following motto, "*magna vis veritatis.*"

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED IN THE Court of COMMON PLEAS, AND OTHER COURTS, IN Easter Term,

1833.

In the Third Year of the Reign of WILLIAM IV.

GOODBURNE *v.* BOWMAN.

April 16.

IN this cause several issues were found for the Defendant, which the Court afterwards decided to be immaterial issues, and gave judgment for the Plaintiff *non obstante veredicto.*

Where immaterial issues are found in favour of Defendant, and judgment is afterwards entered for Plaintiff *non obstante veredicto*, neither party is entitled to the costs of the immaterial issues.

The prothonotary having declined to allow the Defendant or the Plaintiff costs upon these immaterial issues, a rule *nisi* was obtained, on the part of the Defendant, for a review of the taxation; against which

Jones and *Stephen* Serjts. shewed cause. By the seventy-fourth rule, *Trin. W.* 4. no costs shall be allowed on taxation to a plaintiff upon any counts or issues upon which he has not succeeded; and the costs of all issues

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found for the defendant shall be deducted from the plaintiff's costs. In *Kirk* v. *Nowill* (*a*) it was held, that, if plaintiff took issue on several pleas, one of which was insufficient in law, and had a verdict on all the issues except that joined on the insufficient plea, which was found for the defendant; and afterwards judgment was entered up for the plaintiff; still he should not be allowed any costs upon the issue found for the defendant. But upon the new rule the Plaintiff must be taken to have *succeeded*, and the Defendant to have failed. At all events, it is impossible that the Defendant can claim any costs, for the judgment of the Court is against him.

Bompas Serjt. *contrà*, was requested by the Court to confine himself to the Defendant's claim for costs. He contended that, as the Plaintiff, by omitting to demur, had compelled the Defendant to go to trial on the immaterial issues, the Defendant must be taken to have succeeded when those issues were found for him by the jury. The new rule of Court must be considered as a comment on the case of *Kirk* v. *Nowill*, and there the Court said, "Suppose the judgment had been arrested, no costs would have been given. The reason is obvious; the plaintiff has contributed to the costs as well as the defendant. He should have demurred to the defendant's plea; on going on to trial he is equally in fault." (*b*)

TINDAL C. J. It appears to me that neither the Plaintiff nor the Defendant is entitled to costs on these issues.

First, as to the Plaintiff. The rule says, No costs

(*a*) 1 *T. R.* 266.

(*b*) Vide 2 *Vent.* 196. 1 *Barnes*, 4to. edit. 125.

shall

shall be allowed on taxation to a plaintiff, upon any counts or issues upon which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs. Now the issues in question were found for the Defendant, and in no sense of the word can the Plaintiff be said to have *succeeded* on them. If the verdict were *for* him on a bad count, he would not be entitled to costs; still less can he be so entitled, where, upon an immaterial issue, the verdict is *against* him. By obtaining judgment *non obstante veredicto*, he has not succeeded on such issue; he has only put it out of the way.

Now, with respect to the Defendant. In order to entitle him to costs, the issues found for him must be such as he can ultimately succeed on; real issues in point of law, on which judgment can be signed.

Suppose he had pleaded only one plea, bad in point of law, and a verdict had been given for him on that plea; if the Plaintiff afterwards obtained judgment *non obstante veredicto*, could it be contended that the Defendant should have the costs of the cause? This is a *casus omissus* in the rules; and the best course is to hold that neither party shall have his costs.

GASELEE J. at first thought the Plaintiff was not entitled to the costs of these issues, because he ought to have demurred, instead of allowing the Defendant to go down to trial on them; and he likened the case to a motion in arrest of judgment: but, with respect to the Defendant, although he was first to blame for putting a bad plea on record, yet he considered him entitled to his costs as having *succeeded* on the issues in question. The following day, however, the learned Judge said, that, on consideration, he had altered his opinion in this respect, and agreed with the rest of the Court that neither party was entitled to costs on these issues.

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ALDERSON J. concurred with the Chief Justice on both points. The Plaintiff had not succeeded *on* the issues in question, but *notwithstanding* those issues; and as to the Defendant, he could not be said to have succeeded, because the issues were not such as judgment could be entered up on. In *Cox* v. *Thomason* (*a*) there were nine counts for a malicious prosecution, and nine for slander, and a verdict for the Defendant on fifteen. The Plaintiff was held entitled to the general costs, because on the whole record the judgment was for him; but the Defendant was allowed to deduct the issues found for him, because he had relieved himself from that portion of the charges against him: here the Defendant has not relieved himself from any of the charges brought against him.

PARK J. I had intended to express no opinion; but the way in which this has been put by my Lord Chief Justice, and my brother *Alderson*, has convinced me, and I agree with them that neither party should have the costs of these issues.

Rule discharged.

(*a*) 2 *Cr. & Jer.* 498.

April 16.

BOWYEAR *v.* BOWYEAR.

The Court will not stay the proceedings in a writ of right, till the costs of a prior ejectment for the same lands are paid.

THIS was a writ of right for the recovery of lands in *Middlesex*. The Demandant had brought an ejectment in the King's Bench for the same lands, which was tried and failed: whereupon the Demandant commenced a second ejectment in the same Court, the proceedings in which that Court staid till the Demandant should have paid the costs of the former ejectment. The Demandant had also filed a bill in Chancery for a discovery; but

but upon a plea being put in, he omitted to appear to the plea, and the bill was dismissed.

Upon affidavit of these facts, *Wilde* Serjt. obtained a rule *nisi* to stay the proceedings in the writ of right till the costs of the two actions of ejectment should have been paid.

Ludlow Serjt., who shewed cause, relied on *Chatfield* v. *Souter* (*a*) as a case in point. There, the Court would not stay the proceedings in a writ of right till the costs of a prior ejectment were paid.

Wilde. It is a general rule, that in a second ejectment, the Courts will stay the proceedings until the costs are paid of a prior ejectment for the trial of the same title. See *Tidd's Pr.* 538. (9th edit.), and the authorities there cited. The Plaintiff frustrates that rule, if he be allowed to proceed by writ of right for the same premises before paying the costs of previous ejectments, for the proceeding differs only in name. And *Chatfield* v. *Souter* is clearly distinguishable, for there the ejectment never proceeded to trial. Where the demandant has had a trial, and has failed upon the merits, further litigation for the same property, unless upon payment of costs, would be in the highest degree vexatious.

TINDAL C. J. The case of *Chatfield* v. *Souter* is too strong in its circumstances, and in the principle of the decision, for us to decide against it. In proceeding by a second ejectment, the action is in substance the same as the first; but a proceeding in this Court by writ of right, is altogether different from the proceeding by ejectment. The ejectment may have failed because the

(*a*) 3 *Bingh.* 167. He cited also 3 *B.* & *P.* 23. note.

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lessor's entry has been tolled, or because the twenty years within which it ought to have been commenced, may have elapsed. Here the party is pursuing a remedy which is of a different nature, and which, for aught that appears, may have been rendered necessary by the inefficacy of the proceeding by ejectment.

PARK J. I adhere to the opinion I pronounced in *Chatfield* v. *Souter*.

GASELEE J. *Chatfield* v. *Souter*, which is reported more at length in 10 *B. Moore*, p. 572. is not distinguishable from the present case.

ALDERSON J. I am of the same opinion. The authority of *Chatfield* v. *Souter* is decisive, and not to be distinguished.

Rule discharged.

April 17.

MORGAN v. BIRNIE.

Condition precedent. Defendant was to pay for building upon receiving an architect's certificate that the work was done to his satisfaction.

THIS was an action on a builder's contract, by which it was stipulated, among other things, that all the proposed erections should be done in a good and workmanlike manner, and with good sound and well-seasoned materials, and be completed to the reasonable satisfaction of *A. B. Clayton*, or other the architect for the time being of the Defendant, his executors or adminis-

The architect checked the builder's charges, and sent them to Defendant: Held, that this did not amount to such a certificate of satisfaction as to enable the builder to sue Defendant, although Defendant had not objected to pay on the ground that no sufficient certificate had been rendered.

trators,

trators, on or before the 29th day of *October* next ensuing the date thereof, or such further day as the said *A. B. Clayton*, or such other architect, and the said Plaintiff should mutually agree upon. It was further provided, that no additions or alteration should be admitted unless directed by the Defendant, his executors or administrators, or his or their surveyor, in writing; nor should any additions to or alterations of the works thereby contracted for, and contained in the particulars therein specified, vitiate or vacate the contract thereby made, but the price or allowance to be made in respect of any agreed additions or alterations, should be added to or deducted from the monies that should become payable by virtue of the said memorandum of agreement as the case might require, such price or allowance being first estimated or settled by the surveyor or architect of the said Defendant, who should be sole arbitrator in settling such price or allowance, and all disputes that should or might arise in or about the premises: And the Defendant thereby promised and agreed, in consideration of the buildings and works to be done and executed by the said Plaintiff, in manner in the said memorandum of agreement mentioned, that the Defendant would pay or cause to be paid to the Plaintiff the sum of 1250*l.* in manner following, that is to say, that he would pay or cause to be paid such a sum of money, as would be equal to three-fourth parts of the price of the works thereby contracted for, which should have been executed and performed according to the true intent and meaning of the said memorandum of agreement, upon receiving *a certificate in writing* signed by the said *A. B. Clayton*, or other the architect of the Defendant, testifying that the flooring-joists of the first story of the said dwelling-house had been actually laid, and his approval of the works so executed; such further sum of money as would be equal to three fourth parts of

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the price or value of the further works that should have been done subsequently to the date of the architect's said certificate, upon the completion of the carcase of the dwelling-house; and the balance or sum which should be found due to the Plaintiff, after deducting the two previous payments, *within two calendar months after receiving the said architect's certificate that the whole of the buildings and works thereby contracted for had been executed, and completed to his satisfaction.*

The work having been completed, the Plaintiff sought by this action to recover his charges for some additional work not contained in the original contract.

At the trial it appeared, that Mr. *Clayton*, the architect, had examined and approved of the Plaintiff's charges for the buildings mentioned in the agreement, and had written the following letter to the Defendant, more than two months before the action:—"With this you will receive Mr. *Morgan*'s account. My private statement, shewing the variations of prices and qualities, shall be copied and forwarded to you. As regards to when and where executed, my only data exist in my measuring book, which shall be open for your inspection at any time at my office. I also forward you the drawings marked 6 and 7, and the original elevation and plan submitted to the commissioners of woods and forests. I remain, &c.

"*March* 24. 1832. *A. B. Clayton.*"

This letter contained an account, headed, "Final statement of extras and omissions of the carcase of a house for *George Birnie*, Esq., by *T. Morgan*, builder."

A letter was also put in, addressed to *Clayton* by the Defendant, *April* 4th, 1832, in which he asked for *Clayton*'s private statement of prices and quantities; expressed himself anxious to have the matter speedily settled; and made no objection on the ground of not having

having received a certificate. But as it did not appear that Mr. *Clayton* had ever given any certificate of his satisfaction as to the mode in which the work had been executed, *Tindal* C. J. directed a nonsuit, on the ground that the delivery of such a certificate was a condition precedent to the Plaintiff's right of action.

Spankie Serjt. now moved to set aside this nonsuit on the ground, that the agreement did not require the certificate touching the additions, to be writing; and that Mr. *Clayton*'s allowance of the Plaintiff's charges must be deemed an implied certificate, for he could not allow the charges to be correct without implying thereby that the building had been executed to his satisfaction. Besides, it might be doubtful whether any certificate were requisite with respect to charges for additional work: the certificate was to apply only to the building as originally contracted for; and the Defendant had never objected to pay on the ground that a proper certificate had not been rendered.

TINDAL C. J. I was of opinion at the trial, and am still of opinion, that the production of a certificate from Mr. *Clayton* was a condition precedent to the bringing this action. The agreement stipulates, that the price of additions or alterations should be added to the sum contracted for by the agreement, such price being first settled by the architect of the Defendant, who should be sole arbitrator in settling such price, and all disputes that should arise about the premises. Then follows the stipulation for payment in proportion to the work done at two different periods upon receiving a certificate in writing of Mr. *Clayton*'s approval, and for payment of the balance of the whole within two calendar months after receiving the said architect's certificate, that the whole of the buildings contracted for had been executed

to

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to his satisfaction. That appears to involve not only the original, but the additional or extra works. Unless the letter and delivery of the Plaintiff's account, and the checking that account by *Clayton* amount to a certificate, no certificate has been given. It appears to me, that the effect of a certificate would be altogether different; applying to the manner in which the work has been done, while the checking the accounts applies only to the propriety of the charges.

The rest of the Court concurring, the rule was

Refused.

April 18.

FENTON *v.* LOGAN.

An implement of trade is only privileged from distress if it be in use, *and* if there be no other distress on the premises.

TO *replevin* for a thrashing-machine the Defendant avowed for rent arrear, and the Plaintiff pleaded that the machine was an implement of trade, not liable to distress, being in use at the time, and there being a sufficiency of other goods on the premises.

At the trial it appeared that the machine had been let to hire by the Plaintiff to the tenant on whom the Defendant had distrained; that the work for which it had been let was completed on a *Saturday*; and that the distress was made on the *Monday* following.

There was no evidence that any other goods were to be found on the premises.

The jury found that the machine was not in use, and that there was no other distress on the premises, and gave their verdict for the Defendant.

Storks Serjt. moved for a new trial, on the ground that, under these circumstances, the learned Judge who

presided

presided should have directed a verdict for the Plaintiff. As an implement of trade the machine was privileged from distress while in actual use, and if so, must be deemed also privileged for a reasonable time, *eundo et redeundo*, otherwise the privilege would be nugatory. *Monday* might reasonably be allowed for returning, after work completed on *Saturday*. In *Gorton* v. *Falkner* (*a*) it was held, that implements of trade might be distrained for rent if they were not in actual use at the time, and if there were no other sufficient distress on the premises.

TINDAL C. J. The Plaintiff seeks to set aside this verdict, on the ground that the thrashing-machine was an implement of trade in use, and as such privileged from distress. There are several distinct grounds on which certain things are privileged from distress; some absolutely, as materials deposited to be worked up; others, conditionally, that is, if a sufficient distress cannot be had without them. Again, implements of trade are, in some instances, privileged, if they be in use, *and* if no other distress can be found on the premises. In this case neither of those conditions has been fulfilled. In the first place, the machine was not in use, the whole purpose for which it had been hired having been completed on *Saturday*, and the distress having been made on *Monday*; and it is unnecessary to enter into the question whether or not it would have been privileged in the course of removal, for here, in the absence of any evidence of other goods being on the premises, the second condition entirely fails. The case of *Wood* v. *Clarke* (*b*) is conclusive on both points. There it was held that materials delivered by a manufacturer to a weaver, to be by him manufactured at his own home,

(*a*) 4 *T. R.* 565. (*b*) 1 *Cr. & J.* 484.

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were privileged from distress for rent due from the weaver to his landlord; but that a frame or other machinery, delivered by the manufacturer to the weaver, together with the materials, for the purpose of being used in the weaver's house in the manufacture of such materials, was not privileged unless there were other goods upon the premises, sufficient to satisfy the rent due.

PARK J. *Gorton* v. *Falkner* is a decisive authority against the Plaintiff, for it shews that implements of trade can only be distrained if not in use, *and* there be no other distress.

The rest of the Court concurred in

Refusing the rule.

April 18. ANDERSON and Another *v.* THOMAS.

The mis-statement of the form of action at the commencement of a declaration is an irregularity only, and not fatal on special demurrer.

THE Plaintiff commenced a declaration in *assumpsit* on a bill of exchange, with the usual money counts, by alleging that the Defendant was summoned to answer them "of a plea of trespass on the case;" and stated that the Defendant had accepted a bill, payable to Plaintiff or order, of 500*l*., valued in freight, four months after the arrival thereof. Breach, that the Plaintiff had disregarded his promises, and had not paid any of the said monies.

Upon special demurrer,

Wilde Serjt. objected that the declaration did not commence with stating correctly the form of action, pursuant to the rule of Court, *M.* 1654. *s.* 16., and that the breach

was

was too general, inasmuch as a question might arise as to what was or was not the *arrival* on which payment was to be made.

TINDAL C. J. The omission to state the form of action is a mere irregularity, or non-compliance with a rule of Court. There is nothing illegal on the face of the record. The general allegation of non-payment is sufficient, and there must be

Judgment for the Plaintiff.

PERRIMAN *v.* STEGGALL.

April 19.

WILDE Serjt. moved to set aside an award in this cause, made by a barrister, on the ground, that, notwithstanding an objection to such a course, he had received the testimony of *Tucker*, a witness who had been held by this Court to be incompetent: See *ante*, vol. 8. p. 369. *Tucker* had, indeed, released any claim to a surplus under a commission on which he had been declared a bankrupt, but subsequently to the bankruptcy he had been discharged under the insolvent debtors' act, and in that respect was still incompetent.

The Court refused to set aside the award of a barrister, on the ground that he had admitted an incompetent witness.

The Court, adverting to the general rule which precludes interference where the award has been made by a barrister, requested the Learned Serjeant to consider the cases on that subject.

After having looked into those cases, *Wilde* now submitted that the award of a barrister was only deemed final on a point of law where such point was expressly referred to him; and he referred to *Wade* v. *Huntly* (*a*),

(*a*) *Tidd's Pr.* 894. 8th edit.

where

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where it is said the Court will set aside an award for a clear mistake on a point of law; to *Wohlenberg* v. *Lageman* (*a*); to *Chace and Others* v. *Westmore* (*b*), where the Court declined laying down any general rule, and refused to set aside the award, only because they thought the parties intended to refer the point in question. In *Richardson* v. *Nourse* (*c*), Lord *Tenterden* said, "I do not go the length of saying, that where arbitrators proceed upon a mistake of a clear principle of law, the Court will not set aside their award." And in *Young* v. *Walter* (*d*), Lord *Eldon* said, "If there is a question of law, and the parties choose to refer that to the decision of an arbitrator, instead of the Court, why may not he take all moral considerations into his judgment? If they refer to a person to decide all matters in difference according to law, and he means to decide according to law, and mistakes, the Court will set that right. But if a distinct question of law, and nothing else, is referred, and the parties choose to say they will not take the decision of the Court, but will take whatever an arbitrator shall say is the law between them, why may they not so agree?" [*Park* J. What is the use of the condition frequently inserted in arbitration rules, that the arbitrator shall be at liberty to state any point of law on the face of his award, if the point can thus be raised in the way of motion?] The denial of appeal, except upon the insertion of special conditions in the rule, will tend to repress the practice of referring to arbitration; and if such a custom has crept in, it should be reconsidered.

Talfourd Serjt. (*amicus curiæ*) stated, that yesterday the Court of King's Bench, upon the application of *Hoggins*, refused to set aside the award of a barrister,

(*a*) 6 *Taunt.* 251.
(*b*) 13 *East*, 357.
(*c*) 3 *B.* & *Ald.* 237.
(*d*) 9 *Ves.* 364.

upon

upon affidavit that he had admitted the testimony of an incompetent witness.

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TINDAL C. J. I have always thought that, where the parties appoint a lawyer their arbitrator, they appoint him judge of law as well as judge of fact, and it has been the constant practice to refuse any appeal on the merits of the decision.

GASELEE and ALDERSON Js. expressed a similar opinion.

Rule refused.

APPERLEY, Clerk, *v.* Bishop of HEREFORD.

April 20.

QUARE impedit. In the declaration, the Plaintiff, after setting out his title to the advowson of the rectory of *Stoke Lacy*, and his own institution and induction upon a vacancy occasioned by his predecessor being instituted and inducted into the chapelry of *Bartestry*, with cure of souls, alleged that, in *January* 1832, he, the Plaintiff, accepted and was admitted, instituted, and inducted into the vicarage of the parish church of *Ocle Pritchard*, that vicarage and the rectory of *Stoke Lacy* being each of them a benefice with cure of souls, whereby it belonged to the Plaintiff, patron as aforesaid, to present a fit person to the church of *Stoke Lacy*; that he presented to the Bishop of *Hereford*, being the proper ordinary in that behalf, *William Betham*, Clerk, to be admitted, instituted, and inducted, *Betham* being a fit person, but that the bishop refused to admit, &c.

The Defendant pleaded, first, that before the church of *Stoke Lacy* became vacant, after the Plaintiff accepted and

1. In *quare impedit*, the ordinary, unless he has collated, cannot counterplead the Plaintiff's title to the patronage.

2. The declaration shews a sufficient avoidance of a living, if it alleges that the incumbent accepted another benefice with cure of souls, although it contains no allegation that the benefice held by the incumbent was of the value of 8*l.*

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and was admitted, instituted, and inducted into the vicarage of *Ocle Pritchard*, and before the Plaintiff presented *W. Betham*, as in the declaration mentioned, the Plaintiff, by indenture, bargained and sold, and released respectively the advowson, right of nomination, &c. of and to *Stoke Lacy* to *James Holbrook*. Secondly, that the Plaintiff having a benefice with cure of souls, to wit, *Stoke Lacy*, of the value of 8*l.* and upwards, did accept, and was admitted, instituted, and inducted into the vicarage of *Ocle Pritchard*, being also a benefice with cure of souls, and the Plaintiff was possessed of the same; whereby and immediately after such possession, the first benefice became void, and six months from the avoidance elapsed before any person was presented to the same.

The third plea was similar to the second, but more general, omitting the value.

The Plaintiff replied to the first plea, that the indentures in that plea mentioned, were made and sealed *after*, and not *before* the Plaintiff accepted and was admitted, instituted, and inducted into the vicarage of *Ocle Pritchard*; and demurred to the second and last.

Joinder.

The Defendant demurred to the replication to the first plea.

Joinder.

Stephen Serjt. in support of the demurrer to the plea. The pleas are ill, because none of them allege collation by the ordinary; and unless the ordinary has collated, he cannot counterplead the Plaintiff's title to the patronage; 25 *Ed.* 3. *stat.* 3. *c.* 7.; *Elvis* v. *Archbishop of York* (*a*), *Com. Dig. Pleader* 3. (I) 9.

And the count discloses a sufficient avoidance of the

(*a*) *Hob.* 315.

rectory,

rectory, because by the canon law (fourth council of *Lateran*, A. D. 1215), recognised by the common law, —*Evans* v. *Ascough* (*a*), *Staveley* v. *Ullithorn* (*b*), — the acceptance of a second living is a positive avoidance of the first: *Wolferstan* v. *Bishop of Lincoln* (*c*), *Shute* v. *Hogden* (*d*), *Baker* v. *Rogers*. (*e*)

The Court considering *Elvis* v. *Archbishop of York* a decisive authority against the pleas,

Ludlow Serjt. *contrà*, relied chiefly on an alleged insufficiency of the declaration. The acceptance of a second living does not avoid the first at all events, but only where the first is above the value of 8*l*. in the king's books; 21 *Hen*. 8. *c*. 13. *s*. 9.; by which it is enacted, "that if any person or persons having one benefice, with cure of soul, being of the yearly value of 8*l*. or above, accept and take any other with cure of soul, and be instituted and inducted in possession of the same, then and immediately after such possession had thereof, the first possession shall be adjudged in the law to be void;" and by sect. 10. "That it shall be lawful to every patron, having the advowson thereof, to present another, and the presentee to have the benefit of the same, in like manner and form as though the incumbent had died or resigned; any licence, union, or other dispensation to the contrary hereof obtained notwithstanding." That statute would have been unnecessary, if every acceptance of a second benefice avoided the first. If the first be under the value of 8*l*. in the king's books, it is only voidable by sentence of deprivation: *Wats. Clerg. Law*, c. 2. p. 6. *Com. Dig.*, *Esglise*, N 5. And the successor is not entitled to the

(*a*) *Latch*. 233.
(*b*) *Hardr*. 101.
(*c*) 2 *Wils*. 174. 184.
(*d*) *Vaugh*. 129. *Watson's Clerg. Law*, 95.
(*e*) *Cro. Eliz*. 788. *Dyer*, 129 *b*. 283.

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profits during the vacancy, under 28 *H.* 8. *c.* 11. *s.* 3., from the time his predecessor accepted the second benefice, but only from the time he avoids the first benefice *de facto*: *Halton* v. *Cove* (*a*): but he would be entitled from the time of the acceptance of the second benefice, if by such acceptance the first became actually void. The Plaintiff, therefore, should have alleged either that the first living was above value, or that it had been avoided by sentence of deprivation. The count contains no such allegation, and is therefore ill.

TINDAL C. J. This is an action of *quare impedit* brought by the patron of the rectory of *Stoke Lacy*, against the Bishop of *Hereford*, for disturbing him in his right of patronage to present to a void turn in that living: and the mode in which he states the void turn, is, that in *January* 1832, he, the Plaintiff, incumbent of *Stoke Lacy*, accepted and was admitted, instituted, and inducted into the vicarage of the parish church of *Ocle Pritchard*, that vicarage and the rectory of *Stoke Lacy* being each of them a benefice with cure of souls, whereby it belonged to the Plaintiff, patron as aforesaid, to present a fit person to the church of *Stoke Lacy*. The bishop answers, that before *Stoke Lacy* became vacant, the Plaintiff conveyed away the advowson, and that the void turn passed under that conveyance. He then pleads more generally "that the Plaintiff having a benefice with cure of souls, to wit, *Stoke Lacy*, of the value of 8*l.* and upwards, did accept, and was admitted, instituted, and inducted into the vicarage of *Ocle Pritchard*, being also a benefice with cure of souls, and was possessed of the same; whereby and immediately after such possession the first benefice became void; and that six months from the avoidance elapsed before any person was presented

(*a*) 1 *B.* & *Adol.* 538.

by

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by the Plaintiff;" leaving us to infer that upon such lapse the bishop had a right to present. It is admitted, however, that the second and third pleas cannot be supported, because they contain no allegation of presentation within six months, and the first plea is that on which the Defendant relies. But with respect to that plea the authority of the case in *Hobart*, *Elvis* v. *Archbishop of York*, is perfectly decisive. In its facts it is almost the same case: and the ground on which it proceeds is, that two persons in litigation shall never be admitted to dispute the interest of a third. The law is laid down in that case with great precision. Before the statute 25 *Edw.* 3. *c.* 7. *pro clero. stat.* 3., the bishop could in no case whatever dispute the title of the patron; but by that statute, "when an archbishop, bishop, or other ordinary hath given a benefice of right devolute unto him by lapse of time, and after the king presenteth and taketh his suit against the patron, who percase will suffer that the king shall recover without action tried, in deceit of the ordinary or the possessor of the said benefice, in such cases, and in all other cases like, where the king's right is not tried, the archbishop, or bishop, ordinary, or possessor, shall be received to counterplead the title taken for the king, and to have his answer, and to shew and defend his right upon the matter, although that he claim nothing in the patronage." *Hob.* 318.

The present case does not fall within the provisions of that statute; and in *Elvis* v. *Archbishop of York*, the Court says, "For the common law, it was plain, that neither ordinary, as ordinary, neither before collation or after, nor incumbent, either of his collation, nor of the presentation of any other, could plead to the title of the patronage; whereof the reason was pregnant; because neither of them had interest in the patronage, and therefore could not dispute that with which they had

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nothing to do; which is the reason that his collation by lapse (or before the lapse incurred, though it be a wrong), doth not displace the patronage, but shall be said to be done in the right of the very patron, being nothing but institution and induction, which are his office as ordinary as well upon presentation as without, though he doth them out of season. And though this seemed and was indeed extremely mischievous, yet the law would not let in a thing so absurd, and against the law of nature and reason, as to admit two to dispute the interest of a third."

This then being the answer to the first plea, objection is taken to the count that the Plaintiff has not made out his title to present, because he has failed to shew that the rectory was void; having omitted to allege that the rectory of *Stoke* is above the value of 8*l.* in the King's books; and that, if it be under, the benefice is only voidable by sentence of deprivation. Undoubtedly it is only by the canon law that the acceptance of a second benefice avoids the first in *all* cases. But the canons down to the statute of 21 *H.* 8. *c.* 13. are binding on the subject; for Lord *Coke* says, in *Holland*'s case (*a*), that the statute is "in this point but a confirmation and affirmance of the law before." And the only necessity for a sentence of deprivation is to give notice to the patron: but that can scarcely apply to a case in which the party who has accepted the second living is himself the patron. That this is the true distinction, I desire no better authority than *Holland*'s case; where it was resolved, "that before the statute of 21 *H.* 8. *c.* 13., if one had a benefice with cure, and accepted another benefice with cure, the first benefice was void; but it was not an avoidance by the common law, but by the constitution of the Pope, of which avoidance the patron might take

(*a*) 4 *Rep.* 75.

notice

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notice if he would, and might present if he would without any deprivation; but because the avoidance accrued by the ecclesiastical law, no lapse incurred without notice, as upon deprivation or resignation, and yet the patron might present, and take upon him notice if he would: so that for the benefit of the patron the church is void in the principal case, but not for his disadvantage."

Then came the statute which renders the presentation void to all intents, if the living be of a certain value in the King's books. We think the count sufficient without alleging sentence of deprivation, and that our judgment must be for the Plaintiff.

The rest of the Court concurred in giving

Judgment for the Plaintiff.

SPIERS *v.* MORRIS. *April* 22.

THIS was a writ of right tried at bar before *Tindal* C. J., and *Park*, *Gaselee*, and *Alderson* Js.

1. In a writ of right the tenant must begin.

Before the jury were sworn to try the issue on the mere right,

2. Entries of receipt of rent by a deceased executor, under whom demandant claimed, held admissible evidence for demandant, the rent having been received and accounted for by the deceased in his capacity of executor.

Stephen Serjt., on the part of the tenant, tendered the demi-mark, and required that the proceedings should commence with the inquisition as to the seisin of the demandant's ancestor. The Court referred him to *Tooth* v. *Bagwell* (*a*), where it was decided by this Court, that in a writ of right the tenant must begin.

Stephen. In that case the demi-mark was tendered at the trial, a tender, the validity of which is questionable;

(*a*) 3 *Bingh.* 446.

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here it is tendered on joining the issue. Besides, the decision in *Tooth* v. *Bagwell* is inconsistent with prior authorities, and cannot be sustained. In *Hardman* v. *Clegg* (*a*), *Wood* B. required the demandant to begin; and in *Litt.* 514. it is said, that in a writ of right between *John Barre*, demandant, and *Reynold*, *Herle* J. said to the grand assize, after that they were charged upon the mere right, "You good men, *Reynold* gave halfe a marke to the king for the time, to the intent that if you find that the ancestor of *John* was not seised in the time that the demandant hath pleaded, you shall enquire no further upon the right." No case but *Tooth* v. *Bagwell* has laid it down that the tenant is bound to begin, and the practice is highly inconvenient. It is a great hardship on the tenant that he should be compelled to expose his title before it appears whether or not the demandant has any real claim.

TINDAL C. J. I can see no real and substantial distinction between the present case and that of *Tooth* v. *Bagwell*. If this could have been distinguished, I should have been almost glad to get rid of the rule laid down in that case; but the demi-mark was tendered there at the same stage of the proceedings as on the present occasion, and the facts are in all respects the same. Two of the Judges who concurred in that decision are now on the bench, and it would be unseemly in us, under those circumstances, to overrule a case which is consistent with the general practice on similar occasions.

PARK J. From the time of the decision in *Tooth* v. *Bagwell* to the present, it has been considered a settled point that the tenant shall begin. In the case of *Angel* v. *Angel*, on the northern circuit, I acted on that deci-

(*a*) *Holt, N. P. C.* 657.

sion

sion without objection, Sir *James Scarlett* being of counsel for the demandant, and the present Lord Chancellor for the tenant.

GASELEE J. I have always understood this to be the practice, from *July* 1798, when I was present at the trial of a writ of right in which *Galton* was the demandant and *Harvey* tenant; and the then Chief Justice of the Common Pleas decided that the tenant should begin, *Burrough*, *Lens*, and *Pell* being of counsel for the tenant, and *Jekyll* and *Cooper* for the demandant. At that time the rule was said to have been so settled in a case of *Leckie* v. *Harris*. The only case the other way, is that before Mr. Baron *Wood*, which was over-ruled in *Tooth* v. *Bagwell*.

ALDERSON J. *Tooth* v. *Bagwell* cannot be distinguished from the present case, and must be the governing authority in this Court till it has been over-ruled. I pronounce no opinion on that decision; but *Hardman* v. *Clegg* certainly goes too far the other way, because the learned Baron required, after the tender of the demi-mark, a separate issue on the seisin of the demandant's ancestor, before the jury considered the issue on the mere right, and these two issues were tried on two succeeding days. Now, according to the authority of *Littleton*, it is clear that the Judge summed up on both issues at once, telling the jury that it was not necessary to consider the seisin of the tenant, if they held there was no seisin in the demandant: just as in questions of principal and accessory, it becomes unnecessary to consider the guilt of the accessory where the jury acquit the principal. The authority in *Littleton*, therefore, is compatible with an opening the case by either demandant or tenant. *Tooth* v. *Bagwell* was acted on during the last circuit by *Bosanquet* J. and *Taunton* J.

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Stephen then tendered a bill of exceptions, and *Coleridge* Serjt., of counsel for the demandant, having opened the pleadings,

Stephen proceeded to prove the tenant's case, by shewing a possession of about twenty-five years, but no conveyance or other title.

Wilde Serjt., on the part of the demandant, put in the will of *Charles Parker*, bearing date 1779, by which he devised the premises in question to *Thatcher* and *Spiers*, under whom the demandant claimed, and appointed *Thatcher* his executor. *Thatcher* was shewn to have died in 1814.

To shew *Thatcher*'s seisin by receipt of rent, an account kept by *Thatcher*, as executor of *Parker*, was brought from the proper custody, and *Thatcher*'s handwriting being proved, entries of receipt of rent by him as such executor were offered in evidence. It was proved that a bill had been filed against him for an account, upon which he had paid a balance over.

Stephen objected to this evidence, that though it might be admissible from a stranger, it could not be admissible from a party through whom the demandant claimed, and whose interest was the same as his own. A plaintiff in ejectment could not produce in support of his case receipts in the handwriting of his deceased ancestor.

Wilde, and *Coleridge* Serjt. *contrà*. The entries are not made by *Thatcher* in the character of landlord, but in his character of executor; and, as such, were entries against his own interest, he having been liable and compelled to account. The case, therefore, stands on the same ground as any other entries of a similar description.

TINDAL

TINDAL C. J. Whatever interest *Thatcher* may have had in the land, these entries were not made by him in the character of landlord, but in the character of executor; as such, they were entries against his interest, and are properly receivable in evidence.

PARK and GASELEE Js. concurred.

ALDERSON J. The fact of the receipt of rent by *Thatcher* would be clearly evidence if it could be shewn; and the question is whether, after his decease, *Thatcher*'s declarations as to that fact are admissible in evidence. He had full means of knowledge, and he makes entries, which, in his character of executor, are against his interest; upon his decease, therefore, these entries become evidence, as in other cases where the Courts have been in the habit of admitting entries of deceased persons, made against their interest.

The entries were then received in evidence. After the demandant's case was closed, and *Stephen* had replied, the Court recommended a special verdict, when

Wilde, referring to *Booth on real actions*, suggested that it was not competent to the jury to find a special verdict in a writ of right.

The Court, however, thinking it might be done by consent of both parties, the proposal was acceded to; the jury being directed to find first which of the parties had the best mere right.

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(IN THE EXCHEQUER CHAMBER.)

April 23.

SMYTH *v.* LATHAM.

1. The office of paymaster of exchequer bills is an office during pleasure only, and not during good behaviour, under the provisions of 48 *G.* 3. *c.* 1.

2. The appointment of a paymaster in the room of another is, of itself, a revocation of the first appointment.

3. Such former appointment may be so revoked, although the writing conferring that appointment contain no power of revocation.

ERROR on a bill of exceptions. The Plaintiff declared in assumpsit for money had and received, and at the trial before Lord *Tenterden*, put in a writing dated *June* 21. 1811, under the hands and seals of *Spencer Perceval* and others, commissioners of the treasury, by which, after reciting the appointment of *Planta*, with *Nevinson* and *Jadis* in *April* 1811, to the office of paymaster or paymasters of exchequer bills, at a salary of 400*l.* a year each, and the subsequent resignation of *Planta*, the commissioners appointed the Plaintiff, with *Nevinson* and *Jadis*, to be such paymaster or paymasters, at the salary aforesaid, provided the Plaintiff gave approved security for the due execution of the office.

It was admitted, that the Plaintiff had given the requisite security, had discharged the duties of the office, and received the emoluments thereof from *June* 1811 to 5th *July* 1824, when he ceased to act; the commissioners having put the Defendant in his place.

Nevinson, who was called as a witness, then proved that he had been appointed in *September* 1810 in the room of an officer who had been dismissed in consequence of an investigation into his official conduct before a committee of the House of Commons, and *Nevinson*'s appointment contained an express revocation of the writing under which the dismissed functionary had been appointed. He further proved, that from *September* 1810 there had always been three paymasters

of

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of exchequer bills, and never more; and that he, the witness, had never heard of there having been, at any one time, prior to the 11th of *September* 1810, more than three paymasters of exchequer bills. That there was an iron chest in the office of the paymasters of exchequer bills, in which was deposited a great portion of the treasure entrusted to their charge; that there were three keys to the said iron chest, one of which was uniformly held by each of the three individuals acting as paymaster; that immediately upon the Defendant entering upon the duties of a paymaster of exchequer bills, the same key which had been previously held by the Plaintiff was delivered to the Defendant, and retained by him; that the Defendant, in conjunction with *Jadis*, and the witness, had acted as the three paymasters of exchequer bills from the 5th day of *July* 1824 up to the present time; and that the Defendant had received during such period the total sum of 3040*l.* for salary, and extra-allowances upon the fundings of exchequer bills in respect of the said office.

The Defendant then put in a writing dated *July* 5th 1824, under the hands and seals of Lord *Liverpool* and others, commissioners of the treasury, reciting the writing of *June* 21. 1811, and, also, that the Plaintiff, appointed one of the paymasters by that writing, *had resigned*, and appointing the Defendant a paymaster of exchequer bills with *Nevinson* and *Jadis*; salary and security as in the former writing.

The Plaintiff was not shewn to have been guilty of any misconduct.

The Plaintiff contended, that his tenure in the office in question was during good behaviour; and he relied on the 48 *G.* 3. *c.* 1. *s.* 10., which, after reciting that "it is expedient that permanent regulations should be established in relation to the making out, issuing, and paying

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ing off all exchequer bills which may hereafter be issued for any money under the authority of parliament; and that by reason of the multiplicity of payments which may be to be made in paying of exchequer bills, it may be difficult, if not impossible, that every payment should be made by the several officers of the receipt of exchequer; therefore, and to the end the exchequer may regularly be discharged of all the monies required by any act to be applied for paying off any exchequer bills and other charges attending the same;" enacts, "that the commissioners of the treasury shall and may from time to time, by writing under their hands, constitute and appoint such person or persons as they shall think fit, to be the paymaster or paymasters, and shall and may appoint a comptroller, and such other officers and clerks as they shall deem necessary, to pay and discharge the principal sums which shall from time to time be in course of payment upon any exchequer bills; and to pay the interest due thereupon, and the premium or premiums, rate or rates, which, according to any contract or contracts made or to be made for exchanging and circulating the said bills, or any of them, shall be due or payable to such contractors; and to take in and put upon a file or files from time to time all such bills as shall be paid off, to be cancelled as the commissioners of the treasury shall direct; and to do and perform, or cause and procure to be done and performed such other matters and things in relation to the said bills, or the principal and interest therein to be contained, as to the said commissioners of the treasury shall seem meet, and shall be by them directed to be done and performed by such paymaster or paymasters, comptroller, or other officers and clerks for the time being; all which payments shall be made at an office to be kept in or near the receipt of the exchequer at *Westminster* for that purpose; and that the commissioners

sioners of the treasury shall take or cause to be taken security from every person so constituted or appointed, for his duly paying, answering, and accounting for all the monies which he shall receive, and for his true and faithful performance of his office or trust." Section 11. "That the said paymaster or paymasters shall be subject and liable to such inspection, examination, control, and audit, and to such rules in respect to paying, accounting, and other matters relating to the execution of the said office or trust of paymaster as the commissioners of the treasury shall think fit or reasonable to establish or appoint from time to time, for the better execution of the intent and end of that act, and the satisfaction of the proprietors of exchequer bills." Section 12. "That as well the person or persons so constituted or to be constituted paymaster or paymasters, as also the person or persons appointed or to be appointed to examine and control the receipts, payments, and acts of such paymaster or paymasters, shall severally have and receive for the service of themselves, and for the officers and clerks to be employed under them respectively, and for such charges as shall be necessarily incident to the execution of their respective offices, such salaries, rewards, and allowances, as the commissioners of the treasury for the time being shall judge to be reasonable, and shall direct to be allowed to them the said paymaster or paymasters, or comptroller."

Lord *Tenterden* directed the jury, first, That by the true intent, meaning, and legal construction of the several clauses of the said act, the tenure of the paymaster or paymasters of exchequer bills is in law *during pleasure.*

Secondly, That by the legal construction of the above-mentioned writing, bearing date the 21st day of

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of *June* 1811, the Plaintiff had an estate in his said office of paymaster of exchequer bills *only during the pleasure* of the lords commissioners of his Majesty's treasury.

Thirdly, That the writing of the 5th day of *July* 1824 was a legal revocation of the above mentioned writing, bearing date the 21st day of *June* 1811.

Fourthly, That the allegation contained in the above mentioned writing of the said 5th day of *July* 1824, namely, that the said Plaintiff *had resigned* his said office of paymaster of exchequer bills, was a matter of no importance to the issue between the said parties.

Fifthly, That there was no fact at issue between the said parties for the consideration of the jury. And,

Sixthly, That the jury ought to find a verdict for the Defendant.

To which direction the Plaintiff tendered the following exceptions: —

That by the true intent, meaning, and legal construction of the several clauses of the said act, the tenure of the office of the paymaster or paymasters of exchequer bills is, in law, *during good behaviour*.

Secondly, That even had the said act empowered the lords commissioners of his Majesty's treasury to revoke and determine *at pleasure* the appointment of paymaster of exchequer bills, no such power having been reserved in the deed poll, bearing date the 21st day of *June* 1811, the lords commissioners of his Majesty's treasury had not by law the power to revoke and determine the same *at pleasure*. And the Plaintiff further insisted, That, there not being any limitation of the estate expressed in the deed poll bearing date the said 21st day of *June* 1811, by the delivery of such deed poll *a freehold* in the said office of paymaster of exchequer bills passed to him the said Plaintiff.

Thirdly,

Thirdly, That, admitting for the sake of argument that by the true intent, meaning, and legal construction of the several clauses of the said statute, the tenure of the office of the paymaster and paymasters of exchequer bills is in law *during pleasure*; and admitting further, for the sake of argument, that by the deed poll bearing date the 21st day of *June* 1811, the Plaintiff had an estate in his said office of paymaster of exchequer bills only during the pleasure of the lords commissioners of his Majesty's treasury; still the lords commissioners of his Majesty's treasury, who executed the deed poll bearing date the said 5th day of *July* 1824, not having therein or thereby revoked and determined the deed poll bearing date the said 21st day of *June* 1811, the deed poll bearing date the said 5th day of *July* 1824, was not a legal revocation of the deed poll bearing date the said 21st day of *June* 1811.

Fourthly, That the lords commissioners of his Majesty's treasury, who executed the deed poll bearing date the said 5th day of *July* 1824, having therein and thereby founded their right to execute the same solely upon the allegation that the said Plaintiff had *resigned* his aforesaid office of paymaster of exchequer bills, that allegation was the only matter of importance to the issue between the said parties.

The exceptions were argued in *Hilary* term by the Plaintiff in person.

In *Co. Litt.* 79. *a.* it is laid down, "The preamble of a statute, which is the beginning thereof, going before, is, as it were, a key to the knowledge of it, and to open the intent of the makers of the act; it shall be deemed true, and, therefore, good arguments may be drawn from the same."

From the language of the preamble of the 48 *G.* 3. *c.* 1.,

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c. 1., as to the expediency of permanent regulations in relation to exchequer bills, coupled with the absence of any clause or power to revoke or determine appointments at pleasure, it must be inferred, that the paymasters hold their offices during good behaviour; for *Holt* C. J., in *Harcourt* v. *Fox* (*a*), distinctly lays it down, that an indefinite limitation, in an act of parliament, confers an estate for life.

The words "*from time to time*" can only be read as if followed by the words "as circumstances may occur to render it necessary by death, resignation, or removal for misconduct," and cannot be taken as words of limitation of the estate of the person to be appointed.

The eleventh section expressly declares the *degree* of authority which the commissioners of the treasury are to exercise over the paymasters; but as the authority therein given does not extend to their dismissal *at pleasure*, no inference can legally be drawn that they have any such authority; for *expressio unius*, or rather *particularis designatio est exclusio alterius*. Upon this principle, although a wife, convicted of adultery, forfeits her dower by the statute of 13 *Ed.* 1. *c.* 34., she does not forfeit her jointure for the commission of that crime, because it is not so expressed in the statute. (*b*)

And this being a remedial act must be construed liberally. Previously to the passing of this act, the lords of the treasury, holding their offices themselves only during the pleasure of the crown, could not confer on their subordinate officers a more enlarged estate. This was the mischief which was to be remedied by establishing *permanent* regulations in regard to the matters referred to in the act; and the remedy could not be better attained than by giving the paymasters a perma-

(*a*) 1 *Show.* 531. fol. edit. (*b*) 3 *P. Will.* 276.

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nent tenure in their office. Lord *Holt* says, in *Harcourt* v. *Fox*, "When men hold their offices for life, it is an encouragement for the faithful execution of their duties. It is then, also, they acquire knowledge and experience in their employments, having a durable and fixed estate therein, and not being liable to be displaced at the pleasure of those who put them in. And the grant shall be construed most favourably to answer the intents of the law makers, whose design it is to have the office well supplied, which will be best effected when the officer has an estate for life."

If it had been intended that the commissioners should have a power of revoking the appointments at pleasure, such power would have been expressly given by the legislature; for powers must be expressed, not implied, and are construed strictly: *Hixon* v. *Oliver* (*a*): and where justices, commissioners, and others have special authority by statute, they have none but what is under the statute; *R.* v. *Loxdale*. (*b*) In the following statutes in *pari materiâ* the power of removal at discretion is expressly reserved: — 25 *G.* 3. *c.* 10. *s.* 7., 26 *G.* 3. *c.* 57. *s.* 14., 26 *G.* 3. *c.* 101. *s.* 5., 38 *G.* 3. *c.* 86. *s.* 4., 39 *G.* 3. *c.* 13. *s.* 117., 39 *G.* 3. *c.* 21. *s.* 8., 42 *G.* 3. *c.* 116. *s.* 75., 43 *G.* 3. *c.* 21. *ss.* 2. and 4., 43 *G.* 3. *c.* 119. *ss.* 1. 5. 6, and 7., 46 *G.* 3. *c.* 101. *s.* 6., 46 *G.* 3. *c.* 106. *s.* 2., 47 *G.* 3. *c.* 12. *s.* 1., 49 *G.* 3. *c.* 120. *s.* 74., 50 *G.* 3. *c.* 43. *s.* 11., 50 *G.* 3. *c.* 72. *s.* 1., 50 *G.* 3. *c.* 103. *ss.* 27—45., 51 *G.* 3. *c.* 15. *ss.* 5. 7., 51 *G.* 3. *c.* 35., 51 *G.* 3. *c.* 71. *s.* 2., 52 *G.* 3. *c.* 44. *ss.* 1. 4. 9., 56 *G.* 3. *c.* 63. *s.* 6., 52 *G.* 3. *c.* 126. *s.* 2., 43 *G.* 3. *c.* 21. *s.* 5., 52 *G.* 3. *c.* 134. *s.* 2., 53 *G.* 3. *c.* 107. *ss.* 1. 4., 53 *G.* 3. *c.* 116. *s.* 1., 53 *G.* 3. *c.* 121. *s.* 6., 54 *G.* 3. *c.* 114. *ss.* 3. 12., 54 *G.* 3. *c.* 131. *ss.* 1. 6., 54 *G.* 3. *c.* 157.

(*a*) 13 *Ves.* 114. (*b*) 1 *Burr.* 445.

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ss. 2, 3. 8., 55 G. 3. c. 1. ss. 1. 7., 55 G. 3. c. 42. s. 10., 55 G. 3. c. 81., 55 G. 3. c. 107. ss. 1. 4., 55 G. 3. c. 138. s. 6., and 55 G. 3. c. 190., 55 G. 3. c. 191. ss. 1, 2., 56 G. 3. c. 56., 56 G. 3. c. 62. s. 1., 56 G. 3. c. 84. s. 1., 56 G. 3. c. 128. s. 9., 57 G. 3. c. 34. ss. 6. 8., 57 G. 3. c. 107. s. 7., 58 G. 3. c. 20. ss. 2. 21, 22., 58 G. 3. c. 61. s. 1., 58 G. 3. c. 72. ss. 1. 2. 4. 23., 58 G. 3. c. 100. ss. 1—6., 59 G. 3. c. 98. s. 11., 59 G. 3. c. 120. s. 1., 59 G. 3. c. 135., 1 G. 4. c. 39. ss. 1—4., 1 G. 4. c. 49. s. 1., 1 G. 4. c. 69. s. 6., 1 G. 4. c. 112. ss. 2. 5. 25., 1 G. 4. c. 113., 1 & 2 G. 4. c. 57. s. 8., 3 G. 4. c. 100. s. 17., 4 G. 4. c. 23. ss. 1. 5., 4 G. 4. c. 90. ss. 4. 9., 4 G. 4. c. 97. s. 5., 5 G. 4. c. 67. s. 2., 5 G. 4. c. 82. ss. 1, 2., 5 G. 4. c. 92. s. 8., 6 G. 4. c. 106. ss. 2. 4. 7., 6 G. 4. c. 122., 7 G. 4. c. 62. s. 2., 7 & 8 G. 4. c. 53. ss. 1. 4., 7 & 8 G. 4. c. 55. ss. 2. 8., 7 & 8 G. 4. c. 58. s. 3., 7 & 8 G. 4. c. 65. s. 4., 9 G. 4. c. 41. s. 7., 10 G. 4. c. 44. ss. 1. 10., 10 G. 4. c. 50. ss. 12. 18., 11 G. 4. and 1 *W.* 4. c. 14. s. 10., 11 G. 4. and 1 *W.* 4. c. 27. s. 15., 1 *W.* 4. c. 8. ss. 1, 2, 3., 1 & 2 *W.* 4. c. 17. ss. 1. 3., 3 *W.* 4. c. 113. s. 19.

Secondly, the writing of *June* 21. 1811 is a deed poll, by the delivery of which a freehold passed in the office of paymaster of exchequer bills. If a common person grants a rent, or other thing that lies in grant, without limitation of any estate, by the delivery of the deed a freehold passes. *Co. Lit.* 9. *a.* 2 *Bl. Com.* 316. The deed is in conformity with the act 48 G. 3. c. 41., which empowers a permanent appointment, and it contains no power of revocation. In *Worrall* v. *Jacob* (*a*) it is laid down, that a deed executed according to a power, containing no clause of power to revoke, cannot be revoked, though the original power contained such clause.

(*a*) 3 *Mer.* 256.

Thirdly,

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Thirdly, The deed of 5th *July* 1824, under which the Defendant has been appointed to the office of paymaster, does not operate as a revocation of the deed of *June* 21. 1811, for it contains no revocation of that deed; and of the allegation that the predecessor had resigned no proof was offered.

Fourthly, The deed of the 5th *July* 1824, must be taken most strongly against the grantors; *Lit.* s. 370. *Plowd.* 134.; the commissioners are therefore estopped to deny the recital of any particular fact; *Co. Lit.* 252. a. *Rees* v. *Lloyd* (*a*); and having failed to substantiate in evidence the recital of the predecessor's resignation, they are estopped from averring any other right in law or fact to justify the granting of the office to the successor.

Fifthly, That allegation of resignation was the most material fact for the consideration of the jury; for unless that allegation were true, the office was full, and if a man grant that to one which he hath before granted to another for the like term, the second grant will be void.

Wightman for the Defendant, contended that though the statute 48 *G.* 3. *c.* 1. contemplated permanent regulations in the office of paymaster of exchequer bills, it did not contemplate the appointment of irremovable functionaries, an appointment wholly incompatible with the security of the public, where the officer has the disbursement of large sums of money; that the words "*from time to time*" in the statute would be superfluous, if a power of removal and re-appointment were not implied; and that the powers of revocation expressly introduced into other statutes were only *ex abundanti cautelâ*. Then, the instrument of *June* 21. 1811 was not a deed, but merely a

(*a*) *Wight.w.* 123. *Roll. Abr.* 872.

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writing under seal, like an award. The statute did not require a seal; and if the commissioners had no power to appoint for life, the writing could not confer such an estate. If the appointment was only during the pleasure or will of the commissioners, the nomination of a new officer was a sufficient determination of their will to revoke the former appointment; as a demise to a new tenant would revoke an estate at will in a former tenant. And it was not necessary that the Plaintiff's resignation should be shewn; for if he had only an interest during pleasure, the new appointment was an effectual determination of such interest.

Cur. adv. vult.

TINDAL C. J. This case comes before us from the Court of King's Bench, and the questions raised upon the record, arise upon a bill of exceptions tendered by the Plaintiff below, who is, also, the Plaintiff in error, to the directions given to the jury on the trial of the cause, by the late Lord *Tenterden*, then Chief Justice of the Court of King's Bench.

The Plaintiff, at the trial of the cause, took five exceptions to the direction given by the Chief Justice to the jury; of which, the first was in substance this:— That by the legal construction of the several clauses of the statute, 48 *G.* 3. *c.* 1., the tenure of the office of one of the paymasters of exchequer bills is not, as was stated by the Chief Justice to the jury, "during pleasure only," but a tenure during good behaviour. Upon this, the first exception, and by far the most important, as the answer to all the other exceptions appears to depend on this point, we are all of opinion that, according to the legal construction of the statute above referred to, the tenure of the office of a paymaster of exchequer bills is a tenure during pleasure only, and not during good behaviour, or (which is the same in contemplation of law) for the life of the grantee.

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As the office of a paymaster of exchequer bills is not an ancient common law office, of which the duration and the appointment are governed by ancient usage, but is an office of modern origin, and not made the subject of legislative enactment until the statute above referred to, the question as to its duration and tenure is no other than an inquiry into the meaning and intention of the statute itself. And looking to the object of the act, the language of the act, and the various provisions contained in it, we think the meaning and intention of the legislature was, that the appointment should be during pleasure only, and not during the life of the grantee.

The object of the new provision appears with sufficient certainty, by the preamble to the tenth section: "Whereas by reason of the multiplicity of payments, which may be to be made in paying off exchequer bills, it may be difficult, if not impossible, that every payment should be made by the several officers of the receipt of the exchequer; therefore, and to the end the exchequer may regularly be discharged of all the monies required by any act to be applied for paying off any exchequer bills, and other charges attending the same, be it enacted," &c. The object, therefore, expressed by the legislature in this preamble, was to secure the due and regular payment of the exchequer bills from time to time directed to be paid off, by giving new and additional assistance to the officers of the receipt of the exchequer, whenever such assistance should be necessary. The assistance contemplated by the act was necessarily uncertain, both in its extent and its duration. The issue of exchequer bills might at one time, and under one state of circumstances, be much larger than at another; it might be large in time of war, inconsiderable in time of peace; and, consequently, the regular discharge of the exchequer of all monies applied to the payment of exchequer bills, might require at one time a greater, and

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at another a smaller number of officers. Any given number of officers, therefore, however well adapted to the exigencies of the public at the time of their appointment, might be insufficient for the despatch of business, or might be unnecessarily large at a subsequent period. Indeed it is within the reach of possibility that all the exchequer bills might be paid off, and no issue of any new bills take place; in which case, the officers of the receipt of the exchequer would stand in need of no assistance whatever. The object, therefore, of the act could not be that any certain definite number of paymasters, and other officers, should be permanently appointed, but that there should at all times be a number adequate and sufficient, and not more than adequate and sufficient, for the regular payment of the bills which might be outstanding at any particular time. The language of the enacting part of the section leads to the same conclusion. It is enacted that the commissioners of the treasury "shall and may," which, for this purpose, may be taken to be compulsory on them, "from time to time, by writing under their hands, constitute and appoint such person and persons as they shall think fit to be the paymaster or paymasters, and shall and may appoint a comptroller, and such other officers and clerks as they shall deem necessary," to pay off the exchequer bills in the particular manner stated in the tenth section of the statute. The enacting words of the clause, therefore, are equally free from any restriction as to the number of paymasters or other officers. Under these words it might, perhaps, be contended, that they could appoint but *one comptroller*, as one only appears to be mentioned; but they might, at all events, appoint as few or as many *paymasters*, and *other* officers and clerks, as the exigency of the public service might require. They might begin with appointing one paymaster only, if they thought one paymaster, and

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the clerks and officers under him, sufficient at first; and, when need required, they might appoint another paymaster, and so on from time to time, until there were as many as they thought necessary. Such is the obvious and necessary construction of the enacting words of this section. The object, therefore, of the legislature manifestly being that of providing new officers in aid of the old officers of the receipt of the exchequer, uncertain in number, but adequate at all times to the discharge of duties varying in their extent and demand of labour, unless the construction be adopted that the appointment shall be during pleasure only, such object cannot be completely attained. For if the appointment is necessarily during good behaviour, that is, for life, the commissioners of the treasury might, indeed, always *increase* the number when the service of the public demanded more; but they could never *reduce* the number, when, from new circumstances, it became greater than the performance of the public service required. It is, therefore, upon the principle that the object of the act cannot be completely carried into effect, if the commissioners of the treasury have only a power to appoint, but no power to remove, that we hold the construction of the act to be that the power to appoint is a power to appoint during pleasure only, and not for life. Again, the power given to the commissioners of appointing paymasters, is expressed in the enacting part of the tenth section in precisely the same language as that which authorizes them to appoint "such other officers and clerks as they shall deem necessary." The same words, in the same sentence, must receive the same construction: but it would surely be an unreasonable construction of the clause to say, that *all the officers and clerks* appointed to assist the paymasters had a freehold interest in their office, and were not removeable at the pleasure of the commissioners.

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The provisions contained in the 12th section of the act, appear to us to lead to the same conclusion. By that section, the paymasters are to have and receive for their services such salaries, rewards, and allowances as the commissioners of the treasury, for the time being, shall judge to be reasonable, and shall direct to be allowed to them. The general terms of this provision include an authority to diminish, or to increase, from time to time, the salaries of the paymasters, just as the nature of their services deserve. The commissioners, therefore, under this section, might undoubtedly reduce the salary to a nominal sum, if the duties of the office should become merely nominal. But it is surely much more consistent with the general object of the act, that they may altogether dispense with the officers themselves when they think them no longer of use, that is, that they should have the power of removing them at pleasure, than that the officers should continue to hold their offices for life, without any real salary, and without any duty to perform. For it would seem to be an unreasonable construction of the act, to hold, that if ten paymasters had been appointed when ten were necessary, and from a change of circumstances one alone was sufficient to perform all the duties, yet that the commissioners of the treasury have no power of removing the nine, but must still retain the full number at a tenth part of the salary to each. We, therefore, think the meaning and intention of the statute was, and consequently that the necessary construction of it must be, that the office so newly created was to be determined at pleasure, and was not an office for life.

It is objected, however, by the Plaintiff in error, that the general preamble to the act contemplates the establishment, for the first time, of *permanent* regulations for the making, issuing, and paying off exchequer bills; and it is contended, that the commissioners of

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of the treasury have, consequently, only a power to select proper persons, not a power to displace or remove them. But we think this consequence does not necessarily follow. It may be true that the commissioners of the treasury for the time being have, under the act, a permanent power of selecting paymasters and other officers, and of making regulations; but it does not follow, that the office itself of paymaster should be on that account permanent during the life of the appointee. The *regulations* established under the act for the paying off exchequer bills will be just as permanent, whether the commissioners have the power to appoint paymasters for life, or during pleasure only. All that the statute contemplates is, the permanency of the office, notwithstanding the change by appointment of new sets of commissioners of the treasury; not the permanency of the office in a particular individual, or that the regulations which have been once made should be considered unalterable.

It is further objected, that by the 11th section, the paymasters are made subject to such rules and regulations as to the performance of the duties of their office as the commissioners shall think fit or reasonable to establish for the better execution of the act, and the satisfaction of the proprietors; and it is contended, that such provisions would be altogether unnecessary, if the commissioners have the power of dismissal, or if the appointments were during pleasure only. If, indeed, acts of parliament never contained any thing but what was strictly necessary, this argument might be entitled to some weight; but if the necessary inference to be drawn from the other parts of the act is, as we conceive it to be, that the commissioners can appoint during pleasure only, then this provision, even though in strictness unnecessary, must be considered as introduced *pro majori cautelâ* only. But we think this clause not without

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out its use, even though the office of paymaster should be held to be an office during pleasure. For under it the commissioners of the treasury would have power to make regulations to bind successive paymasters, once for all, instead of making them *de novo* upon each new appointment.

It is then argued, that, as no mention is made in this section of the power of dismissal, it must be considered that none such exists. The answer to this argument appears to be, that the clause only refers to the duty of the officer, whilst he continues such officer, and such particulars only are mentioned, as equally relate to the duties of the office whether it be for life or during pleasure: the clause being framed with reference to the duties of the office, not to the duration of it. Upon the whole, therefore, that clause seems to leave the question where it was before.

It is further objected, that the statute is a remedial act, and is, therefore, to be construed liberally; that one of the mischiefs intended to be remedied, was the want of permanency of the office of paymaster, which before the passing of the act was at pleasure only, being limited in duration to the continuance in office of the commissioners of the treasury by whom such appointment was made. It may be granted, that one object of the act was to make the office permanent; but if the officer continues to hold his office, as undoubtedly he now will, notwithstanding the change of the commissioners of the treasury, that object is equally answered whether the office itself be for life or during pleasure only. But then it is argued, that the appointment for life is the only, or at all events the best mode by which the persons appointed can be expected to become qualified to perform the duties of the office. It may be, however, at least doubtful whether such conclusion is just, when applied to an office which is merely ministerial,

terial, and not in its nature demanding any very great extent of experience or ability, but depending for its discharge in a more especial manner on the industry, assiduity and integrity of the officer.

Lastly, it is argued, that if the terms of this statute be doubtful, it ought to be construed by analogy to various other statutes, cited on the part of the Plaintiff, in which a similar provision as to the appointment of officers has been made, and in all of which it is urged, that whenever it is intended there should be a power of revocation or dismissal, such power is expressly reserved by the act, or the appointment itself is directed to be made during pleasure only.

This kind of argument is well founded only in the cases where the construction of a statute is doubtful or obscure; but in the present case, we think the construction of this statute, for the reasons before given, is clear and unambiguous. Where, however, such powers of revocation or dismissal are expressly given by any act, in which the necessary object of the act itself implies, as here, that the officer shall be appointed during pleasure only, we think, in such cases, the insertion of the power of dismissal, or of the clause that the appointment is held during pleasure only, must be referred to the principle before adverted to, namely, that the provision is inserted *ex abundanti* and *pro majori cautelâ* only.

As we think, for the reasons above given, the first exception must be overruled, those exceptions which follow will require less discussion. For, as to the second exception, viz., that, upon the legal construction of what is called the deed poll, by which the Plaintiff was appointed, he had a freehold in his office, the first observation which arises is, that the instrument is no deed at all. The mere annexation of a seal will not make an instrument a deed which is not a deed in its own nature. An award by an arbitrator, although under seal, does

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not thereby become a deed. And in the present case, where the commissioners have merely a statutory power to constitute paymasters "by writing under their hands," the annexation of a seal, without the requisition or authority of the statute, will not give a different effect, or impart different legal consequences to the instrument by which the authority is executed, than if the commissioners had appointed by writing under their hands only. But the more direct answer to this exception is, that if the commissioners had no authority by the statute to appoint for life, whatever may be the frame of the instrument by which they make the appointment, it cannot create a greater estate than they had power by the statute to grant.

The 3rd exception to the charge of the Chief Justice is, that even if the deed poll, 21st of *June* 1811, granted the office to the Plaintiff during pleasure only, still the deed poll of 5th of *January* 1824 is no legal revocation of such pleasure, inasmuch as it contains no distinct clause of revocation, and no provision which rendered such clause unnecessary. But when it is considered that the subsequent appointment is that of a new officer in the stead and place of Mr. *Smith*, it seems to bear so close an analogy to the case of tenancy at will, where a demise to a new tenant would be a determination of the will as to the former tenant, as to make it difficult to maintain that the new appointment is not a virtual revocation of the former: at all events, as the appointment of the Defendant to the *same office*, and to the receipt of the *same salary*, is the sole ground upon which the Plaintiff founds his right to recover in this action, we think it cannot be contended *by him* that such new appointment, inconsistent with the continuance of the former, is not a sufficient revocation, in fact, of the pleasure of the commissioners that the Plaintiff should continue in his office.

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The 4th ground of exception is, that the commissioners having stated in the appointment of the Defendant, that the Plaintiff had *resigned* his office, and this allegation not having been proved, the subsequent appointment cannot operate as a revocation of the former. But we agree entirely in opinion with the late Lord Chief Justice, that the fact of resignation was not a fact necessary to be proved by the Defendant in this cause; and that, whether the Plaintiff had resigned or not, the fact of the appointment of a successor to the same office was a sufficient indication of the commissioners' pleasure that he should no longer continue in the possession of the office.

And this gives the answer to the 5th and last exception taken, viz., that the Defendant was bound to prove the fact of resignation. In the first place, it is no fact asserted by the Defendant; but secondly, and principally, it is a fact immaterial to the issue between the parties; for, as the office is an office during pleasure only, the will of the commissioners to determine the former appointment has been sufficiently declared by the appointment of a successor. But we think, independently of the reasons before given for overruling the several exceptions taken by the Plaintiff at the trial, that upon another ground he is not entitled to the judgment of this Court. For, either the Defendant has, as the Plaintiff contends, been put into his, the Plaintiff's place, and appointed his successor to the same identical office, and in that case the new appointment operates as a revocation of the Plaintiff's grant; or the Defendant has not been placed in the very same identical office, and in that case the Plaintiff's grant is still unrevoked, and in existence; the Plaintiff is still one of the paymasters of the exchequer; and as the commissioners of the treasury are not limited in the number of paymasters appointed, it follows that the Defendant has been

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been appointed to another and distinct paymastership from that of the Plaintiff. Upon the latter supposition, the money received by the Defendant has not been money received in respect of the Plaintiff's office, as is the case where there can be but one officer, and the officer *de facto* has received the several fees paid for performing the duties of the office; but the money received by the Defendant is the amount of salary and allowances received by him in respect of his own appointment; and in that case, such money cannot be money had and received to the use of the Plaintiff. And, indeed, we cannot but think the decision at which we have arrived is no less consistent with the justice of the case than with the rule of law. For it would indeed have been most unjust with respect to the present Defendant, that after having performed the duties of the office for nearly six years, he should be called upon to pay over the emoluments of it to the Plaintiff, who had bestowed neither labour nor time in the execution of its duties, nor, for any thing that appears in this special verdict, had given any previous notice to the Defendant of his intention to dispute his appointment.

Upon the grounds above stated, we think the exceptions tendered at the trial are untenable, and must be overruled; and that in no view of this case can the Plaintiff be entitled to judgment in his favour, but that the judgment of the Court below must be affirmed.

Judgment affirmed.

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HODGES *v.* Lord LITCHFIELD.

April 24.

In *assumpsit* for the breach of an agreement to sell an estate, the Court refused to allow the Defendant to select certain of several allegations of damage contained in a single count, and pay money into Court on those particular allegations.

THE Plaintiff declared in *assumpsit* for damages occasioned to the Plaintiff by the Defendant's refusal to perform an agreement for the sale of an estate by the Defendant to the Plaintiff. By the agreement set out, it appeared that the Plaintiff had paid 1500*l.* towards the purchase money, and that the estate was described as paying tithes by a *modus*.

After averring the Defendant's breach of the agreement, the Plaintiff alleged his damage as follows: — By reason of which said several premises, the Plaintiff not only lost and was deprived of all the benefits and advantages which might and would otherwise have arisen and accrued to him from the completion of the said purchase by the Plaintiff, but was put to great charges and expenses, amounting in the whole to a large sum of money, to wit, the sum of 1000*l.*, in and about the negotiating and agreeing for the purchase of the said estate by the said articles agreed to be sold, and having the same conveyed; — and in and about the investigating the title to the said estate, and the existence and effect of the said supposed *modus* in the said articles mentioned; — and in and about the defence of and in a certain suit, commenced and prosecuted by the Defendant against the Plaintiff in the Court of Chancery, for compelling a specific performance by the Plaintiff of the said articles of agreement, and in which suit, the bill filed by the Defendant against the Plaintiff was dismissed by the same Court; — and in and about the making and performing of divers journies, and otherwise respecting the said purchase: — and also thereby the Defendant lost and was deprived of a great part of the gains and profits

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profits which he might and would otherwise have made and acquired from using and employing the said sum of 1500*l.*, so paid by him as aforesaid, and other monies provided and kept by the Plaintiff for the completion of the said purchase; — and suffered and sustained divers losses to a large amount, to wit, to the amount of 200*l.* on the resale of certain sheep, bricks, and hurdles, purchased by the Plaintiff for the stocking of the said farms, lands, and hereditaments, and improving the same, with a view to the completion of the said purchase.

The Plaintiff delivered the following particular of his demand: —

To interest, at 1 *per cent.*, on 1500*l.* deposit, from 7th of *November* 1828 to 23d of *June* 1832, when the deposit was returned - - -	£54	3	3
To monies paid by the Plaintiff in and about the negotiating and agreeing for the purchase of the estate to be sold by the Defendant to the Plaintiff, and having the same surveyed, and in and about the investigating of the title to the said estate, and the existence and effect of a supposed *modus* in lieu of tithes, to which the same was stated to be subject, and the making and performing of divers journies, and otherwise respecting the said purchase -	262	1	3
To the amount of the extra costs paid by the Plaintiff, in and about his defence of a certain suit commenced and prosecuted against him by the Defendant in the Court of Chancery, for compelling a specific performance by the Plaintiff of certain articles of agreement,			

bearing

bearing date the 7th of *November* 1828, and in which suit the bill, filed by the Defendant against the Plaintiff, was dismissed by the same Court -	£227	9	3
To the amount of the losses suffered and sustained by the Plaintiff in the resale of certain sheep, bricks, and hurdles, purchased by the Plaintiff for stocking and improving the farms, lands, and premises mentioned in the said articles of agreement, with a view to the completion of the said purchase -	100	0	0

Talfourd Serjt. obtained a rule *nisi* to pay money into Court, upon the allegations in the first count of the declaration, of damage, occasioned by loss of interest on the 1500*l.*, and by expenses incurred in negotiating and agreeing for the purchase of the estate, in having the same surveyed, and in investigating the title to the estate, and the existence and effect of the supposed *modus* in lieu of tithes.

Wilde Serjt. who shewed cause against the rule, referred to *Hallett* v. *East India Company* (*a*), *Salt* v. *Salt* (*b*), *Strong* v. *Simpson* (*c*), and *Fail* v. *Pickford* (*d*), as conclusive authorities to shew that money cannot be paid into Court, in an action like this, for unliquidated damages; still less upon a selected portion of an entire count. The effect of confining the payment to particular allegations would be to try the cause on affidavit.

Talfourd. If the damages, though unliquidated, are capable of being estimated, money may be paid into

(*a*) 2 *Burr.* 1120.
(*b*) 8 *T. R.* 47.
(*c*) 3 *B. & P.* 14.
(*d*) 2 *B. & P.* 234.

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Court, and the mere form of action will not preclude such payment. *Fleuro* v. *Thornhill* (*a*), *Hutton* v. *Bolton.* (*b*) And that part of the count being excluded on which the damages, if any, may be more especially deemed unliquidated, the paying in on the residue of the count would be the same thing as paying in on an action on a surveyor's bill. But no action lies for the third and fourth item in the Plaintiff's particular. Damages cannot be recovered for the loss of profits contingent upon a bargain; *Walker* v. *Moore* (*c*); or for the costs of a Chancery suit, which, if the Plaintiff had been entitled to them, would have been awarded to him in the Court of Chancery.

TINDAL C.J. In the case supposed, the surveyor would have been acting on a contract; here he proceeded *ex mero motu*. Besides, you have broken a contract with the Plaintiff; why is the Court to help you to pare down his demand, so as to compel him to go to trial at his own risk.

PARK J. I decide on the ground that it is not the practice to allow a party to pay money into Court on part of a count.

GASELEE J. concurred.

ALDERSON J. The whole count, taken together, being in substance a demand of unliquidated damages, we cannot interfere.

Rule discharged.

(*a*) 2 *W. Bl.* 1078.
(*b*) 1 *H. Bl.* 299. *n.*
(*c*) 10 *B. & C.* 416.

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REYNARD, Assignee of BIRCH, an Insolvent, *v.* ROBINSON.

April 24.

UPON a special case from the Northern Circuit, it was stated that the Defendant lent to the insolvent, in or about the month of *November* 1830, the sum of 40*l.* upon the application of the insolvent's brother, *John Birch*, and under a stipulation that it was to be repaid in a few months. The money being only advanced for a short period, no security was taken.

By letter of *June* 1831, the Defendant applied for payment; but

The insolvent not having paid the money, another letter was written, and sent by the Defendant to him, as follows: —

"*September* 10th, 1831.

"I wrote to you some months ago, to desire you to bring me the money I lent you last *November*, to which I have received no reply. I fully expected you would have paid it back about *May-day*, and I think it strange I have not seen or heard from you. Now, the fact is, I want the money, and must have it in a few weeks; and if you do not bring or send it, I certainly shall put it into the hands of an attorney to get, and hope you will save me the trouble and yourself the expense of such proceedings."

No action or other proceeding in the law was commenced by the Defendant against the insolvent for the recovery of the money; nor was any attorney or solicitor employed to bring such action or other proceeding, or to threaten to bring the same.

Sept. 10th, Defendant, after previous application, wrote to his debtor, "I want my money, and must have it in a few weeks; and if you do not bring or send it, I certainly shall put it into the hands of an attorney to get."

In the beginning of *October*, in consequence of this letter, the debtor, then in insolvent circumstances, paid the debt. On the 21st of *November* he petitioned the Insolvent Debtors' Court for his discharge: Held, that the payment to Defendant was not *voluntary*, within the meaning of s. 32. 7 G. 4. c. 57., although the Defendant never commenced in action.

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In the beginning of *October* 1831, *Joseph Birch*, the insolvent, (who, as it afterwards appeared, was then in insolvent circumstances,) in consequence of the letters above mentioned, repaid the said sum of 40*l.* to the Defendant. When the payment was made, the insolvent told Defendant that he need not be alarmed about his money, as he could pay all his creditors 20*s.* in the pound.

The insolvent was arrested on the 18th of *November* 1831, at the suit of the Plaintiff, for debt, and was committed to *York* castle on the 21st. He presented his petition to the Court for relief of insolvent debtors, and executed the usual assignment of his estate and effects, pursuant to the statute, on the 23d of *November* 1831, and was declared and adjudged to be entitled to the benefit of the act of parliament for the relief of insolvent debtors, on the 7th of *March* 1832.

The question for the opinion of the Court was, whether or not the payment of the said sum of 40*l.*, made by the insolvent to the Defendant under the circumstances above mentioned, was a voluntary payment or transfer of money within the meaning of the thirty-second section of the statute 7 *G.* 4. *c.* 57.; and if the Court should be of opinion that it was a voluntary payment or transfer of money within the meaning of the last mentioned section, a verdict was to be entered for the Plaintiff, damages 40*l.*; but if otherwise, a verdict was to be entered for the Defendant.

Wilde Serjt. for the Plaintiff. By 7 *G.* 4. *c.* 57. *s.* 32. it is enacted, "That if any prisoner who shall file his or her petition for his or her discharge under this act, shall, before or after his or her imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal security for money, bond, bill, note, money, property,

property, goods, or effects whatsoever, to any creditor or creditors, or to any person or persons in trust for, or to or for the use, benefit, or advantage of, any creditor or creditors, every such conveyance, assignment, transfer, charge, delivery, and making over, shall be deemed, and is hereby declared to be fraudulent and void, as against the provisional and other assignee or assignees of such person appointed under this act: provided that no such conveyance, &c. shall be deemed fraudulent and void, unless made within three months before the commencement of such imprisonment." This was a voluntary payment made within three months of the insolvency. There was no immediate pressure, no actual proceeding by legal compulsion; and the statement in the special case, that the Defendant paid in *consequence* of the letter of *September* 10., means only that he paid subsequently to the receipt of it. In *Herbert* v. *Wilcox* (*a*), it was held that a payment by an insolvent to a creditor within three months before the insolvent's imprisonment, was void under 7 *G.* 4. *c.* 57. *s.* 32., although the word *pay* was not employed in that section; and in *Cook* v. *Rogers* (*b*) it was holden by the Court, that where a bankrupt made a payment to defendant on the eve of bankruptcy, as *he* said, and as circumstances indicated, to benefit the defendant, the assignee might recover the amount of the defendant, notwithstanding the defendant adduced evidence to shew that he had pressed for payment, and had threatened to arrest the defendant.

TINDAL C. J. Upon the best construction of the facts in this case, coupled with the letter of the 10th of *September*, we must take this to have been money paid under actual pressure. The applicant says, "I want the money, and must have it in a few weeks; and if you do not

(*a*) 6 *Bingh.* 203. (*b*) 7 *Bingh.* 438.

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bring or send it, I shall certainly put it into the hands of an attorney to get." It is clear, therefore, that he intended to have recourse to legal proceedings; his letter was calculated to excite the debtor's apprehensions, and it appears to have had the effect, for the money was paid in three weeks. The case, in finding that the money was paid in consequence of this letter, has, in effect, stated the legal conclusion, that the payment was not voluntary.

PARK J. Putting ourselves in the place of a jury, which, upon this statement of facts, we are required to do, I am of opinion that this was not a voluntary payment. So far from giving the debtor time, the letter of the creditor requires payment in a few weeks, and the debtor pays within a few weeks to avoid an attorney's bill. I must infer that this was done in compliance with the letter, and under pressure; and I cannot agree that *in consequence* means only subsequently to the receipt of the letter. It is, in fact, a finding that the payment was under pressure.

GASELEE J. If the letter had been, "I shall apply to my attorney if you do not pay to-morrow,"—or, "to-morrow fortnight," there could have been no doubt. But I think the letter is the same in effect, and that our judgment must be for the Defendant.

ALDERSON J. By stating that the payment was made in consequence of the letter of the 10th of *September*, the Plaintiff has decided the case against himself.

Judgment for the Defendant.

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GROTTICK *v.* PHILLIPS and Others.

April 25.

THE Plaintiff, as assignee of *John Gamaliel Lloyd*, the sheriff of *Warwickshire*, declared that he had issued a *capias* against *Samuel Phillips* and *William Phillips*, in an action of *assumpsit*, indorsed for bail for 20*l.* and upwards, commanding the sheriff to take him *S. P.* and the said *W. P.*, and him the said *S. P.* and the said *W. P.* safely to keep, until the said *S. P.* and the said *W. P.* should have given bail, or made deposit in an action of *assumpsit*, or should by other lawful means be discharged; under which writ the sheriff arrested *S. P.*, and took bail for him to the action; on which occasion *S. P.*, *S. P.* Senior, and *R. S.* executed a bond to the sheriff, whereby it was conditioned that *Samuel Phillips* should appear in the Court of Common Pleas, *to answer the Plaintiff in an action of assumpsit*, and should cause special bail to be put in to the action in eight days. Averment of his omission to do so, and of the assignment of the bond to the Plaintiff.

Declaration on bail-bond set out *capias* in *assumpsit*, to take *S. P. and W. P.*, — the arrest of *S. P.* — and the execution of a bail-bond conditioned that *S. P.* should appear to answer Plaintiff in an action of *assumpsit*.

Held, not such a discrepancy between the *capias* and condition of the bond as to be objectionable on general demurrer.

Plea, that the sheriff did not take the said *Samuel Phillips* by his body, under and by virtue of the said writ of *capias*; without this, that the said writing obligatory, in the declaration mentioned, was taken by the said *John Gamaliel Lloyd*, as such sheriff as aforesaid, by virtue and in pursuance of the said writ of *capias*, conditioned for the appearance of the said *Samuel Phillips* in the said action in the writ mentioned, in manner and form as the Plaintiff had above in his declaration in that behalf alleged.

Replication, that the writing obligatory was taken by the sheriff by virtue and in pursuance of the said writ

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of *capias*, conditioned for the appearance of the said *Samuel Phillips*.

General demurrer and joinder.

Coleridge Serjt. in support of the demurrer. The declaration is ill, for it discloses a variance between the *capias* and the bail bond. The *capias* is against *Samuel* and *William Phillips*, but on the face of the condition of the bail bond, the inference is that *Samuel Phillips* is to appear in an action in which he is to be sued alone. Now the bail bond should set forth the parties, and the time and place of appearance. 2 *Wms. Saund.* 60. a. In *Renalds* v. *Smith* (*a*), where upon a *capias* returnable in the Common Pleas, the sheriff made a mandate to the high bailiff of the honor of *Pomfret* to take the Defendant, so that the sheriff might have him before his Majesty at *Westminster*, in five weeks of *Easter*, a bail bond, taken with condition for the defendant's appearance before his said Majesty, in five weeks of *Easter*, was held to describe an appearance in the Court of King's Bench, and therefore void.

TINDAL C. J. This is an objection of which the party cannot avail himself on general demurrer. There is not necessarily that variance for which the Defendants contend. By the writ it is alleged the sheriff was commanded to take and keep *Samuel Phillips* and *William Phillips*, and to keep them till they should have given bail, or made deposit in an action of *assumpsit*. The words are general; in *an* action of *assumpsit*; and although I admit the intention upon the *capias* appears to be to sue jointly, yet, as the condition of the bond when set forth is stated also to be to answer the Plaintiff in *an* action of *assumpsit*, how are we to say of

(*a*) 6 *Taunt.* 551.

necessity

necessity that this condition does not mean the same action as the mandate in the writ. If the objection be made on the score of ambiguity, the ambiguities ought to have been pointed out by special demurrer.

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Judgment for the Plaintiff.

This case was called on for argument on a former day, when it appearing that the party demurring had omitted to state on the margin of the paper books the point to be discussed, the Court were about to give judgment for the Plaintiff; but, upon the supplication of *Coleridge*, allowed the matter to stand over, giving out at the same time, that in future the penalty of immediate judgment would always be attached to the omission by the party demurring to state the points of his argument.

COCKS *v.* NASH.

April 26.

ADAMS Serjt. on the part of the Defendant, *Folliott Nash*, obtained a rule *nisi*, calling on the Plaintiff, and *Hammond*, an attorney of this Court, to produce, in order that it might be inspected and copied by the Defendant, a deed of assignment and release, bearing date *February* 17. 1827, between *Mary Nash* of the first part, the Plaintiff and *Hammond* of the second part, and certain creditors of *Mary Nash* of the third part; or that, in default of compliance, the Defendant might be allowed, on the trial of the cause, to give secondary evidence of this deed.

H. held as trustee for *N.* and her creditors; a composition deed containing a release of *N.* The Defendant being sued as surety for a debt due from *N.* to Plaintiff who had executed the composition deed at Defendant's request, and upon his undertaking to continue responsible for the debt, the Court refused to compel *H.* to produce the composition deed for Defendant's inspection.

From

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From affidavits filed in the cause, it appeared that by this deed, now in the custody of *Hammond*, *Mary Nash's* estate had been assigned to the Plaintiff and *Hammond*, in trust for the discharge of debts due to the Plaintiff, and other creditors of *Mary Nash*, and after the discharge of the sums due to them, in trust for *Mary Nash*, to whom there was, in the deed, a general release. At the time this deed was executed, the Defendant *Folliott Nash* was a surety to the Plaintiff for the debt due to him from *Mary Nash*; and the Plaintiff refused to execute the deed, or to become a trustee, unless he could be assured of retaining his claim upon the Defendant. The Plaintiff ultimately executed the deed at the entreaty of the Defendant, and upon his undertaking to continue responsible as before. (See *ante*, p. 341.) *Hammond* was not an attorney when the deed was first placed in his hands.

Wilde Serjt. on the part of the Plaintiff, and *Coleridge* Serjt. on the part of *Hammond*, shewed cause against the rule. They referred to *Ratcliffe* v. *Bleasby* (*a*), where all the cases are considered, and where it was established as a principle, that the production of a deed can only be compelled at the hands of a party to the suit, and where he holds the deed as trustee for the party applying. *Hammond* was no party to this suit; nor did he hold the deed as trustee for the Defendant, but as trustee for *Mary Nash*. The circumstance that *Hammond* was an attorney of the Court made no difference, since he never held the deed in that character.

Adams. According to the decision in this cause, *ante*, p. 341., this deed, operating as a release of the principal debtor *Mary Nash*, is a release also of her

(*a*) 3 *Bingh.* 148.

surety,

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surety, *Folliott Nash*. *Hammond*, therefore, must be deemed to hold it as trustee for *Folliott Nash*: he may also be called on as an officer of the Court. [*Alderson* J. We have no evidence that the deed there pleaded is identical with that to which the present motion applies; and *Hammond* does not hold it as an officer of the Court. *Ex parte Aitken*. (*a*)] The Court may accede to the application on the principle laid down in *Blakey* v. *Porter* (*b*), where it was held, that if one part only of an indenture be executed, the Court of Common Pleas would compel the party having the custody of it to produce it for inspection, upon an action commenced against him by the other party; or *Bateman* v. *Philips* (*c*), where the Court compelled a defendant to produce an unstamped agreement in his custody, to which the plaintiffs claimed to be parties in interest, in order that they might get it stamped, although they were not an instrumentary party.

TINDAL C. J. This is a rule which calls on the Plaintiff in the cause, and *Hammond* an attorney of the Court, to produce, in order that it may be inspected and copied by the Defendant, a deed of assignment and release, bearing date *February* 17th, 1827, between *Mary Nash* of the first part, the Plaintiff and *Hammond* of the second part, and certain creditors of *Mary Nash* of the third part; or that, in default of compliance, the Defendant may be allowed on the trial of this cause to give secondary evidence thereof.

The application fails as to the Plaintiff, because, on the face of the affidavits, it appears that he is not in the possession of the deed. *Hammond* is not a party to the suit; he, therefore, is in the condition of a person who may be compelled to produce the instrument on a *subpœnâ duces tecum*, if the instrument be such as he

(*a*) 4 *B.* & *Ald.* 47. (*b*) 1 *Taunt.* 386. (*c*) 4 *Taunt.* 157.

ought

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ought to produce. If, therefore, we were to compel the production now, we should deprive the party of his appeal from the decision of the Judge at *Nisi Prius*, as to the propriety of withholding the instrument in question. But it is urged, that *Hammond* is a trustee for the Defendant: now, first, no authority has been cited to shew that one, not a party to the suit, may be compelled to produce a deed because he holds it in the character of trustee: but, then, *is Hammond* a trustee for the Defendant? By the deed in question, *Mary Nash*'s estate is assigned to the Plaintiff and *Hammond*, in trust for the benefit of the Plaintiff and other creditors of *Mary Nash*, and, after the discharge of the sums due to them, in trust for the debtor. Now, the Defendant was never a debtor to the Plaintiff; he was only surety for a debt due from *Mary Nash* to the Plaintiff; and it by no means follows that the Plaintiff and *Hammond*, because they are trustees for the principal debtor, are trustees for her surety also. Supposing, however, that *Hammond is* a trustee for the Defendant, still, enough appears on these affidavits to shew that we ought not to grant this rule. We must interpret the trust in the same way as a court of equity would do; and after the undertaking by which the Defendant induced the Plaintiff to execute the deed in question, a court of equity would never allow the Defendant to interpose that deed as a shield against the Plaintiff's demand. We should therefore be disposed to discharge the rule, even if we had authority to compel a person, not a party to the suit, to produce a deed which he holds only as a trustee. It has been urged, however, that *Hammond* is an officer of the Court, and that, as such, he may be called on by the Court to produce the deed in question. But the distinction has been correctly pointed out in the case to to which my Brother *Alderson* has referred, *Exparte Aitken*. To give the Court jurisdiction, the deed must come into his hands in his capacity of such officer.

Here,

Here, the deed was entrusted to *Hammond* in his ordinary capacity, and before he was an attorney of the Court.

PARK J. It is now eight years since all the cases on this subject were canvassed in *Ratcliffe* v. *Bleasby* (*a*); the rule then laid down has been acted on ever since, and I see no reason for extending it. With respect to the argument, that *Hammond* is an officer of the Court, he is not therefore bound to produce the deed. The applicant, in order to avail himself of that argument, should have shewn that the deed was placed in *Hammond*'s hands in his capacity of officer of the Court, and not in his individual capacity. It would be premature for us to decide on his liability to produce the instrument, because, by so doing, we should take from the party the opportunity of contesting the decision of the Judge at *Nisi Prius*.

GASELEE J. One ground appears to me, in the exercise of our judicial discretion, quite sufficient for rejecting this application: namely, that it might interfere with the remedy, which, upon the affidavits, it appears the parties may seek in a court of equity.

ALDERSON J. We should run the risk of doing great injustice if we were to accede to this application, for it involves a matter which may be tried in a court of equity, although, in this Court, that matter presented only an immaterial issue.

The practice has been to compel a party to the suit to produce a document required by the adverse party, where both have an interest in the same document; and this, in order that the suit may proceed; — that the adverse party may not have an obstacle thrown in his way.

(*a*) 3 *Bingh.* 148.

Here,

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Here, the parties have come to issue, and when the Defendant has called *Hammond* under a *subpœnâ duces tecum*, his liability to produce the deed may be argued on both sides upon the facts appearing at the trial. We should preclude that discussion if we were to accede to this application. Over trustees *as* trustees, this Court has no jurisdiction: they must be left to the court of equity. But see what injustice we should occasion here, if we were to admit that *Hammond* is a trustee. This Court has determined that a parol agreement cannot stand in the way of a release under seal. But if the Plaintiff executed the release to *Mary Nash*, under an agreement that it should not be used to discharge *Folliott Nash*, that may be an answer in a court of equity to any discharge claimed under it by *Folliott Nash*.

As to the circumstance of *Hammond*'s being an attorney, unless he received or holds the deed in his character of attorney the Court cannot interfere. But *Hammond* received and holds the deed in his individual capacity, and not as the attorney of *Folliott Nash*.

Rule discharged.

May 8.

HARTLEY *v.* COOK and Another.

Two parishes having been united, in which before the union the parish clerk was appointed by the parishioners and the rector, Held, that after the union, an appointment by the rector alone was invalid.

ASSAULT and battery.

The Defendants plended that before and at the time when, &c. in the first count mentioned, the Defendant, *William Cook*, was one of the churchwardens of the parish of *St. Mary Colechurch*, in *London*, united with the parish of *St. Mildred, Poultry*, in *London* aforesaid, duly elected and appointed, and that the

Plaintiff,

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Plaintiff, just before, and at the said time, when, &c. in that count mentioned, to wit, on, &c. being *Sunday*, wrongfully and improperly intruded himself into and took possession of the reading desk in the said first count mentioned, such reading desk then and there being in a part of the parish church of the said parishes so united, and being the place assigned and duly set apart for the parish clerk of the said parishes, for the performance by him of his duties as such clerk, in assisting in the celebration of divine service in the said church; and the Plaintiff thereby then and there hindered and prevented a certain person, to wit, one *T. S. Bullard*, who then and there was the parish clerk of and for the said parishes, duly appointed and entitled to act in that behalf, from taking possession of the said reading desk, as he was entitled and about to do, in order to assist and for the purpose of assisting in the celebration of divine service in the said church, and which service, before and at the time, when, &c. in the first count mentioned, was about to commence, and was accordingly celebrated in the said church: and thereby also the Plaintiff unlawfully and improperly hindered, delayed, and prevented the due, proper, orderly, and devout celebration of divine service in the said church, to the great scandal of divers devout parishioners of the said united parishes, then and there being assembled for the purpose of such service; whereupon the Defendant, *W. Cook*, so being such churchwarden as aforesaid, then and there gently admonished the Plaintiff of the impropriety and indecency of such his behaviour, and requested him to come out and from, and leave the said reading desk, in order that the said *T. S. Bullard* might, as such clerk, take possession thereof, for the purpose aforesaid, and that divine service might not be interrupted or delayed, and might then and there immediately commence, but the Plaintiff then and there

neglected

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neglected and refused so to do, and wrongfully remained in possession of the said reading desk, whereupon the Defendant, *W. Cook*, so being such churchwarden as aforesaid, and the Defendant, *William Payne*, at his request, and in his aid and assistance, and by his command, gently laid their hands upon the Plaintiff, in order to remove him from the said reading desk, and to prevent his further delaying and hindering the due and orderly celebration of divine service; and in so doing, did necessarily and unavoidably commit the said several supposed trespasses in the said count mentioned, as they lawfully might for the cause aforesaid; doing no unnecessary damage or violence to the Plaintiff, or his apparel, upon that occasion; without this that the said Defendants or either of them were guilty of the said supposed trespasses in the first count mentioned; and that, the Defendants were ready to verify, &c.

Another plea, in other respects the same, omitted the allegation of *Bullard* being clerk.

At the trial before *Tindal* C. J. the Plaintiff gave in evidence a writing, deposited at the Bishop of *London*'s office, by which the rector of the united parishes had appointed him clerk on the 16th of *April* 1831, and proved that he had officiated from that time till the 15th of *January* 1832.

It appeared, however, that a body of the parishioners, expressing dissatisfaction at this appointment, and claiming a right to appoint in conjunction with the rector, the rector yielded to their wishes, and on the 9th of *October* withdrew his appointment of the Plaintiff, and confirmed an appointment of *T. S. Bullard*, made at a joint vestry of the two parishes, in the month of *April* preceding.

The Plaintiff, nevertheless, had refused to relinquish his appointment, and persisted in doing the duty of

parish

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parish clerk till the 15th of *January* 1832, when the affray took place, which was the subject of this action.

The parishes of *St. Mildreds* and *St. Mary Colechurch*, originally distinct, were united by the 22 *Car.* 2. *c.* 11., one of the acts passed in consequence of the great fire of *London*. By sect. 63. of that statute it is enacted, "That the several parishes hereafter mentioned shall be respectively united into one parish, in manner hereafter following; that is to say, (amongst others) the parishes of *St. Mildreds Poultry*, and *St. Mary Colechurch*, shall be united into one parish, and the church heretofore belonging to the said parish of *St. Mildreds Poultry*, shall be the parish church of the said parishes so united." By sect. 65., "That the plate and goods belonging to the churchwardens of the parishes of those churches to be rebuilded, whereunto the other churches burnt down are united by this act, shall be enjoyed by the parishes of those churches to be rebuilded, whereunto the churches burnt down are united by this act, to the use of the said churches and parishes respectively." And by sect. 68., "That notwithstanding such union as aforesaid, each and every of the parishes so united, as to all rates, taxes, *parochial rights*, charges and duties, and all other privileges, liberties, and respects whatsoever, other than what are herein-before mentioned and specified, shall continue and remain distinct, and as heretofore they were before the making of the present act."

Before the union, there was evidence that, in the parish of *St. Mildreds* at least, the clerk had been appointed by the parishioners in conjunction with the rector. Since the union, the appointments had been made sometimes by the rector alone, sometimes by the rector and parishioners.

The jury having found a verdict for the Defendants,

Jones Serjt. obtained a rule *nisi* for a new trial on the following grounds: —

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That a custom of the two parishes to appoint in conjunction with the parson could not exist by law, as it could not be immemorial, and was not given by the fire act 22 *Car.* 2. *c.* 11. That if the custom of each parish was preserved by the statute, the appointment of *Bullard* was void, as he should have had the majorities of the vestries separately, and not of a joint vestry. That his appointment should have been by the rector and parishioners concurrently, whereas this was an appointment by the parishioners *vigore suo*, and two months after by the rector. That the Plaintiff being in peaceable possession, and *Bullard* having never acted, the Defendants could not raise the question by an indecorous assault in the church on the Plaintiff, who was sitting there to perform his duty in the usual course.

Andrews and *Stephen* Serjts. shewed cause.

Whether *Bullard* has been properly appointed or not, the Plaintiff is without any right of action unless he can shew a good appointment in himself. Now before the union of the parishes the appointment was clearly in the parishioners and the rector jointly, and the 68th section of the act of union preserves all the rights of the parishioners. The Plaintiff's appointment therefore is invalid, unless sanctioned by the vestries of the two parishes at a joint meeting of both, or a separate meeting of each. But as it was never sanctioned by the parishioners in any way, he has no title to sue.

Bullard's appointment, however, was legal, having been made at a joint vestry of the united parishes, and ratified by the rector. Even at common law, after a union, there is but one church, one benefice, and one advowson; *Per Powell* J. in *Reynoldson* v. *Blake* (*a*); and under a union by the statute of *Car.* 2. not only the churches but the parishes are united. *St. Swithin* v. *St. Mary Bothaw.* (*b*)

(*a*) 1 *Ld. Raym.* 196. (*b*) *Skin.* 588.

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Jones. At the time of the assault in question the Plaintiff was in possession of the office of parish clerk, and had discharged its functions for some months. It is therefore a presumption of law that he was legally in possession, and it was for the Defendants who dispute that presumption to establish the negative, — *Williams* v. *East India Company* (*a*), — that he was not legally clerk, by shewing that *Bullard* at least had been duly elected. At common law the appointment of parish clerk is in the rector; *Bullard* therefore could not have been legally elected, unless it were by statute or custom; now the statute of 22 *Car.* 2. *c.* 11. contains no enactment on the subject; and the custom, if it existed before, was certainly destroyed by the union. At all events it has not been observed in the appointment of *Bullard*, for before the union the custom must have been for the parishioners and rector of each parish to act separately; here the appointment was made at a joint vestry, with the additional objection that the rector was not present, as he ought to have been, to assist in deliberation. His subsequent assent is by no means equivalent. In *Wilson* v. *M'Math* (*b*), it was decided that the rector has a right to preside at a vestry; and in *Rex* v. *Buller* (*c*), it was held that if a presiding officer, who by the constitution of a borough formed an integral part of an elective assembly, departed from it after the meeting had been regularly formed, and the election entered upon, but before it was completed, an election made after his departure was void. So in *Rex* v. *Bower* (*d*), where a charter directed that out of certain persons to be nominated in a particular mode, "the mayor, aldermen, bailiffs, principal burgesses, and other burgesses and inhabitants of the borough for the time being (they being for that purpose congregated and assembled together), or the greater

(*a*) 3 *East*, 192.
(*b*) 3 *B.* & *Ald.* 244.
(*c*) 8 *East*, 389.
(*d*) 1 *B.* & *C.* 492.

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part of them as should be so congregated, might, by the greater part of the voices of them, so assembled, choose one to be mayor;" it was held, that a majority of each definite body must be present in order to make a valid election. The absence of the rector therefore at the vestry by which *Bullard* was appointed, is a conclusive objection to the validity of his appointment.

Cur. adv. vult.

TINDAL C. J. This is an action of assault and battery, in which the Defendants justified, in one of the special pleas, that the Defendant *Cooke* was one of the churchwardens of the parish of *St. Mary Colechurch London*, united with the parish of *St. Mildreds Poultry* in *London*, and that the Plaintiff on the day on which, &c. being *Sunday*, wrongfully and improperly intruded himself into and took possession of the parish clerk's reading desk in the parish church of the said parishes so united, and thereby prevented one *T. S. Bullard*, who was the parish clerk, duly appointed, from taking possession of the reading desk; whereby the Plaintiff unlawfully hindered and prevented the devout celebration of the divine service; and because the Plaintiff refused to give it up, Defendant *Cooke* as churchwarden, and the other defendant, *Payne*, in his aid, gently laid their hands on Plaintiff to remove him from the reading desk, &c. In another special plea the Defendants justified in a similar manner upon the ground that the Plaintiff had wrongfully and improperly intruded himself into and taken possession of the reading desk of the parish clerk, without alleging that *Bullard* had been duly appointed to that office. To these pleas and to others very similar in substance, the Plaintiff replied the general traverse, *de injuria*, &c., upon which the issues were joined.

The cause was tried before me at the sittings for *London* after last *Michaelmas* term, when the jury found a verdict

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a verdict for the Defendants; to set aside which verdict, and for a new trial, a motion was afterwards made upon the ground, that although a custom may have existed in each of the parishes of *St. Mildreds Poultry*, and *St. Mary Colechurch*, separately, namely, that the parish clerk of each of those parishes should be chosen by the rector and the major part of the parishioners in each parish; yet, by the union of the two parishes under the 22 *Car.* 2. *c.* 11., such custom in each is altogether destroyed, and the common law right of appointment by the rector must prevail in its stead; and consequently that *Bullard* could have no legal right to the office of parish clerk of the united parishes, inasmuch as the validity of his election rested upon a custom which had already ceased to exist; but that the Plaintiff, who was nominated and appointed by the rector of the united parishes to fill the office before *Bullard* was elected, must be held to have had the right to the office of parish clerk. For the purpose, however, of determining the question immediately before the Court, namely, whether this action is maintainable, it seems to us sufficient to determine the latter point only, whether *Hartley* was duly appointed to the office of parish clerk; for whatever may be the objection to *Bullard*'s election to the office, yet, unless *Hartley* was the real parish clerk, he has no right of action. For if *Hartley* was a stranger, who had intruded himself into the reading desk of the parish clerk immediately before the celebration of divine service, whereby the decent and proper celebration of such service would be prevented, we feel no doubt, whatever, but that the churchwardens of the parish, upon his refusal to give up the possession of the desk, might justify removing him from it without violence. The case of *Hawe* v. *Planner* (*a*), appears to us a sufficient authority to this point.

(*a*) 1 *Saund.* 13.

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There can be no doubt, after the evidence given at the trial, that before the union of the two parishes in 1670, there was a custom in the parish of *St. Mildreds Poultry*, and a similar custom in the parish of *St. Mary Colechurch*, that the parish clerk of each parish should be chosen by the rector and the major part of the parishioners; and the only question as to the validity of *Hartley*'s appointment becomes this, whether by the union of the two parishes, by the statute 22 *Car.* 2. *c.* 11. *s.* 63., this custom in each parish was put an end to, and the common law mode of nomination by the rector interposed in its stead.

The union of churches (not of parishes) was a proceeding by no means unusual at common law. It is laid down in many authorities, and particularly in *Bro. Abr.* (*Appropriation, Union and Consolidation*), that where two churches were of little value, and unable to support their charges, they might be united and consolidated by the assent of the ordinary, the patrons and the incumbent, with the leave of the crown; or where the church was vacant at the time of the union, (which was much more frequently the case,) then, by the assent of the patrons and the ordinary, and the licence of the crown: such an union, however, consolidated the churches, not the parishes; it neither extinguished the tithes nor a *modus* for them; 1 *Salk.* 165.; but as to taxes, duties, rates, reparations of the church, &c., the parishes continued distinct as before; *Hob. Rep.* 67. In giving judgment in *Reynoldson* v. *Blake* (*a*), Mr. Justice *Powell* says, "If there is, after the union, but one church and one benefice (as is proved before), there can be but one advowson, and that is of the church *to which* the union is made," and this, he says, "agrees with the canon law from which the doctrine of unions was borrowed." *Lyndwood's Provinc.* 159. "By union,

(*a*) 1 *Ld. Raym.* 196.

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the church which is united becomes extinct, and of the two benefices the more worthy shall be retained." So that if this had been an union of the two churches at common law, independent of the provisions contained in the statute of *Car.* 2., then would the church of *St. Mildreds Poultry to which* the union has been made, have been considered as the church or benefice which was retained, the church of *St. Mary Colechurch* being extinct; but the parishes of *St. Mildreds Poultry* and *St. Mary Colechurch* would have continued parishes as before, having one parish church, one incumbent, one parish clerk; but having all the rights which were before vested in the parishioners of each parish, and which were capable of being still exercised, preserved in full force: separate tithes, separate *moduses*, separate poor rates, separate proportions of church rate, separate officers: and under these circumstances it seems difficult, on any legal principle, to lay it down, that the union of the two churches had *deprived* the parishioners of either parish of the right of electing the parish clerk which they before possessed: or at all events, that the union of the two churches should *deprive the parishioners of St. Mildreds Poultry*, of the right which they before possessed of electing, together with the rector, the parish clerk who was to officiate in the same identical church, and the same identical reading desk in which he performed the duty before the union. Unless, however, the parishes of *St. Mildreds Poultry* were so deprived, and the common law right vested in the rector, the appointment of *Hartley* by the rector would have been bad if this had been an union at common law.

The question, however, does not rest upon the nature and effect of an union at common law, but upon the construction of the statute of 22 *Car.* 2. *c.* 11. under which such union was made. The sixty-third section of that statute, after enacting "that the fifty-

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one parishes within the city thereinafter mentioned, shall remain and continue as theretofore they were," proceeds to enact "that the several *parishes* hereafter mentioned shall be respectively united into one *parish* in manner hereafter following, that is to say, (amongst others) the parishes of *St. Mildreds Poultry* and *St. Mary Colechurch*, shall be united into one parish, and the church heretofore belonging to the said parish of *St. Mildreds Poultry* shall be the parish church of the said parishes so united." By the seventy-first section the site of the church of *St. Mary Colechurch*, and the materials thereof remaining in the said site, are given and settled on the company of mercers for the purpose of building a free school thereon. And that the church which remained was considered as that *to which* the union was made, appears clearly from the sixty-fifth section, where it is enacted that the plate and goods belonging to the churchwardens of the parishes whose churches are burnt down and not to be rebuilded, shall be enjoyed by the churchwardens of the parishes of those churches to be rebuilded, "*whereunto the other churches burnt down are united* by this act, to the use of the said churches and parishes respectively." The union therefore, created by the act, was not simply an union of *churches* as that which was known to the common law, but in the very terms of the act, an union of *parishes*; and if the legislature had rested there, it might have created a difficulty as to the continuance of a custom which existed before the union in each separate parish; but it appears to us any difficulty of that nature is prevented by the sixty-eighth section of the act, by which it is enacted "that notwithstanding such union as aforsaid, each and every of the parishes so united, as to all rates, taxes, *parochial rights*, charges and duties, and all other privileges, liberties and respects whatsoever, other than what are hereinbefore mentioned and specified, shall continue and remain

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main distinct, and as heretofore they were before the making of the present act." As therefore, before the union of the two parishes, there was in the parish of *St. Mildreds Poultry*, a right belonging to the parishioners to join with the rector of the parish in the election of a parish clerk of such parish; and as by the act, the church of *St. Mildreds Poultry* is the church which remains, and consequently that *to which* the union is made; this parochial right is preserved and must still continue, unless it is one of those particularly mentioned and specified in the act: there is, however, no mention or specification of this right, and, consequently no reason why it should have been abolished by the union. Indeed the union contemplated by the statute is just as perfect whether the parish clerk performing the duty in the church of *St. Mildreds Poultry* to which the church of *St. Mary Colechurch* has been united, is appointed by the rector alone, or by the rector and the majority of the parishioners in both parishes, or by the rector and the majority of the parishioners in the parish of *St. Mildreds Poultry*. We by no means intend to express any opinion that the election by the rector and the majority of the parishioners *in the two parishes*, assembled in their united vestry, is not the more proper mode of election. Such a mode appears to have taken place immediately after the union was made, and seems more entirely to preserve the parochial rights of both parishes. But as it is not necessary for us to decide this point on the present occasion, we hold it sufficient to say that the appointment of *Hartley*, being made by the rector alone without the concurrence of the majority of the parishioners of the parish of *St. Mildreds Poultry*, is a void appointment, and consequently, under the circumstances of this case, that he cannot support the present action of trespass.

Judgment for Defendants.

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April 30.

AIRETON *v.* DAVIS.

1. A warrant of attorney not filed pursuant to 3 *G.* 4. *c.* 39. *s.* 2. is not void generally, but only as against an assignee under a valid commission of bankruptcy.

2. The sheriff is liable to an action for not selling under a *fi. fa.* with reasonable expedition.

THE Plaintiff sued the Defendant, sheriff of *Essex*, for neglect of duty in the execution of a writ of *fi. fa.*, issued by the Plaintiff against one *John Barker*, indorsed to levy 146*l.* 5*s.* The declaration, after alleging the delivery of the writ to the sheriff in the usual form, proceeded as follows: "By virtue of which said last mentioned writ, the Defendant, so being sheriff of the said county of *Essex* as aforesaid, afterwards and before the time appointed for the return of the said last mentioned writ, to wit, on the 16th day of *June*, at, &c., seized and took in execution divers goods and chattels of the said *J. Barker* of great value, to wit, of the value of the monies so indorsed on the said last mentioned writ, and directed to be levied as last aforesaid; and remained and continued in possession of the said last mentioned goods and chattels for divers long spaces of time, to wit from the 16th day of *June* in the year aforesaid, until the 1st day of *August* then next ensuing, and from thence until the said *J. Barker* committed a certain act of bankruptcy as hereinafter mentioned, the said sums of money so indorsed on the said last mentioned writ, and directed to be levied as last aforesaid, during all that time remaining unpaid to the said Plaintiff, to wit, at, &c. And the Plaintiff further said that during any part of the time last aforesaid, the Defendant as such sheriff as aforesaid, could and might and ought to have sold the said last mentioned goods and chattels, under and by virtue of the said last mentioned writ, and to have raised thereout the monies indorsed on the said last mentioned writ, and directed to be levied as last aforesaid, ready to have been paid to the Plaintiff

on

on the return of the said last mentioned writ, to wit, at, &c. Yet the Defendant so being sheriff of the said county of *Essex* as aforesaid not regarding the duty of his office as such sheriff, but contriving and unjustly and wrongfully intending to injure, prejudice, and aggrieve the said Plaintiff in that behalf, and to deprive him of the money so indorsed on the said last mentioned writ, and directed to be levied as last aforesaid, and of the means of obtaining the same, wilfully neglected the execution of his office, and fraudulently and wrongfully, and without the consent of the Plaintiff, forbore to sell the said last mentioned goods and chattels of the said *J. Barker*, from the said 16th day of *June* in the year aforesaid, until the said 1st day of *August* then next following, and from thence until afterwards and before the return of the said last mentioned writ the said *J. Barker* committed a certain act of bankruptcy, whereupon he the said *J. Barker* was afterwards and before the return of the said last mentioned writ declared a bankrupt, under and by virtue of the statute then in force concerning bankrupts. By means whereof the said last mentioned goods and chattels so being in the hands of the sheriff as aforesaid, under and by virtue of the said last-mentioned writ, unsold, then and there, to wit, from the time of the committing of the said act of bankruptcy, ceased to be the goods and chattels of the said *J. Barker*, and then and there became and were unavailable for the purpose of levying thereout the said sums so indorsed on the said writ and directed to be levied as last aforesaid, whereby the Plaintiff was hindered and prevented from having the same sold under and by virtue of his said last-mentioned writ, as he otherwise might and would have had: by means of which said last-mentioned premises the Plaintiff had been and was not only greatly injured and deprived of the benefit of his said last-mentioned writ, and of the means of obtaining

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taining the said last-mentioned monies indorsed on the said last-mentioned writ, and directed to be levied as last aforesaid, and which were still wholly unpaid as last aforesaid, and was likely to lose the same, but had also been put to great costs and expenses in and about endeavouring to compel the Defendant to make a return to the said last-mentioned writ, and to pay the monies so indorsed on the said writ, and directed to be levied as last aforesaid, amounting to a further large sum of money, to wit, the sum of 100*l.*"

There were likewise counts for a false return of *nulla bona*.

It appeared at the trial that the *fi. fa.* had been issued on the 16th of *June* 1831, on a judgment entered up in the Court of King's Bench two days before, under a warrant of attorney given by *Barker* to the Plaintiff the 19th of *January* 1829. The sheriff seized *Barker*'s goods on the 16th of *June*, when there was sufficient property on the premises to satisfy the Plaintiff's debt. But he never proceeded to a sale, although called on to do so by a letter from the Plaintiff's attorney on the 29th of *July*. And *Barker* carried on his business of a brewer as usual, the sheriff's man being very little in sight. On the 5th of *October* a commission of bankrupt was issued against *Barker*. On the 3d of *November* the Plaintiff ruled the Defendant to return the writ of *fi. fa.*, when the Defendant, having applied in vain to the Plaintiff and to *Barker*'s assignee for an indemnity, obtained from the Court of King's Bench time till the 2d day of *Hilary* term 1832, to return the writ, upon an undertaking to pay into Court the amount indorsed on the writ. On the 9th of *January* 1832 the Defendant, having obtained an indemnity from *Lloyd*, *Barker*'s assignee, returned *nulla bona*; whereupon on the 28th of *January* the Plaintiff obtained a rule *nisi* to attach the Defendant for not paying the money into Court, pursuant

ant to his undertaking; and the Defendant obtained a rule *nisi* to discharge such undertaking. Both these rules were discharged, upon the Defendant giving a new undertaking to pay the money into Court in a fortnight; and the Plaintiff then commenced the present action.

The Defendant gave in evidence the commission against *Barker*, but his proof, as to the act of bankruptcy and petitioning creditor's debt, was such that the jury found there was no good petitioning creditor's debt; no act of bankruptcy subsequent to the 17th of *June*; and that the sheriff's delay was unreasonable; and gave a verdict for the Plaintiff on the count above set forth, which

Jones Serjt. obtained a rule *nisi* to set aside, as against evidence and obtained by surprise; contending, moreover, that a new trial should be had, because there was no proof of the Plaintiff having filed the warrant of attorney under which the *fi. fa.* issued; 3 G. 4. *c.* 39.; and that there was no precedent for such a count against the sheriff as that on which the Plaintiff had obtained his verdict, the proper course being to compel a sale by writ of *venditioni exponas.*

Wilde Serjt. shewed cause. As to the form of action, it is clear from *Doker* v. *Hasler* (*a*) that a sheriff cannot justify keeping possession of goods seized, in ease of the debtor and to the loss of the creditor. *Bac. Abr. Sheriff*, N.; *Dalton, Office of Sheriff*, 103. 109. And *Carlile* v. *Parkins* (*b*) is a conclusive authority that this action lies.

The Court assenting to this,

Wilde proceeded to the objection on the warrant of attorney. By the 3 G. 4. *c.* 39. *s.* 2. it is enacted "that

(*a*) 2 *Bingh.* 479. (*b*) 3 *Stark.* 163.

if

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if at any time after the expiration of twenty-one days after the execution of such warrant of attorney, a commission of bankrupt shall be issued against the person who shall have given such warrant of attorney, then and in such case, unless such warrant of attorney or a copy thereof shall have been filed within twenty-one days from the execution thereof, or unless judgment shall have been signed or execution issued on such warrant of attorney within the same period, such warrant of attorney and the judgment, and the execution founded thereon, shall be deemed fraudulent and void against the assignees under such commission; and such assignees shall be entitled to recover back and receive for the use of the creditors of such bankrupt at large, all and every the monies levied or effects seized, under and by virtue of such judgment and execution." A warrant not filed within twenty-one days is not generally void, but void only as against an assignee under a valid commission of bankruptcy. And if there was no petitioning creditor's debt, *Lloyd* is not assignee. At all events, as it is to be assumed that a party has acted according to law till the contrary is proved, it is for those who object, to prove the omission: as in cases of annuity, the party who objects the want of enrolment is bound to prove it. *Doe* v. *Mason* (*a*), *Doe* v. *Bingham* (*b*), *Muskett* v. *Drummond* (*c*).

Jones and *Stephen* Serjts. in support of the rule.

Unless this warrant of attorney were filed, the Plaintiff has no title to sue; and though, as against a party who gives a warrant, the Court may, till the contrary is proved, assume it to have been properly filed, such an assumption is not allowable against the sheriff, or any third party, but the Plaintiff must, as in all other cases,

(*a*) 3 *Campb.* 7.
(*b*) 4 *B.* & *Ald.* 672.
(*c*) 10 *B.* & *C.* 153.

establish

establish a clear title to sue. In cases on the annuity act the assumption of enrolment operates only against those who have granted the annuity.

As to the form of action, the sheriff has the whole time, between the delivery and return of the writ, to obey it, and within those *termini* he cannot be guilty of delay. It were hard that he should be subject to this action, and also to applications to the Court for a *venditioni exponas*.

TINDAL C. J., — after expressing his approbation of the verdict as to the questions of fact, — upon the objection that there was no proof of the Plaintiff's warrant of attorney having been filed within twenty-one days of its execution, said, Unless the Defendant shews that *Lloyd*, was legally the assignee of *Barker*, he cannot raise the point. It appears to me that a warrant of attorney, not filed, is, still, only void as against an assignee under a valid commission; here there was no petitioning creditor's debt to support the commission against *Barker*, and, therefore, the sheriff cannot defend himself under the title of the assignee.

PARK, GASELEE, and ALDERSON Js. concurring in this, and also that on the other questions the verdict should not be disturbed, the rule was

Discharged.

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May 2.

SYLVESTER *v.* ANTHONY.

The copy of a warrant of attorney, with the affidavit, filed pursuant to 3 *G.* 4. *c.* 39., is, as against the party filing it, good evidence of the original, without proof of collation.

IN *May* 1831 the Plaintiff had obtained from one *Pearson* a warrant of attorney to enter up judgment against *Pearson* for 150*l.*, and this warrant was conditioned for the payment of 72*l.* by *Pearson* to the Plaintiff, by four instalments, in four months.

The Defendant gave the Plaintiff a guaranty for the due payment of these instalments.

The first and second instalments were paid, but *Pearson* having made default in the third instalment, and a commission of bankrupt having been issued against him, the Plaintiff sued the Defendant on his guaranty.

The defence was, that on the 1st of *September* 1831 the Plaintiff had issued a *fi. fa.* against *Pearson*'s effects for the third instalment, but instead of selling the goods seized under the *fi. fa.* had, without the Defendant's consent, given *Pearson* time by taking another warrant of attorney from *Pearson* and one *Furneaux*, for the balance due from *Pearson*, and some other small sums, in all 62*l.*, payable by monthly instalments of 14*l.* each, upon which warrant he afterwards entered up judgment.

To establish this, the Defendant, after proving notice to the Plaintiff to produce the original warrant of attorney executed by *Pearson* and *Furneaux*, gave in evidence a copy filed by the Plaintiff on the 20th of *September* 1831, under the provisions of the statute 3 *G.* 4. *c.* 39., and also the affidavit of its being a true copy, filed at the same time. The signature of this affidavit was proved; but no other proof was given that the copy filed was a true copy of the original warrant of attorney,

or

or that any search had been made at the proper office for the original warrant.

It was objected on the part of the Plaintiff that the copy ought not to be received in evidence, but *Tindal* C. J. admitted it, subject to a motion on the point; and a verdict having been found for the Defendant,

Coleridge Serjt. obtained a rule *nisi* to set it aside, on the ground above stated.

Talfourd Serjt. who shewed cause, contended that the copy filed according to the provisions of 3 G. 4. c. 39., became a species of duplicate original, and was admissible in evidence like any other record.

Wilde Serjt. and *Coleridge* in support of the rule. By rule *M.* 42 *G.* 3., the original warrant of attorney must be filed when judgment is signed. And judgment having been signed upon the warrant in question, the Defendant had the means of producing the original from the proper office; the copy therefore ought not to have been received; at all events not till proof of search and failure to find the original.

TINDAL C. J. If a party thinks proper to avail himself of the provisions of 3 *G.* 4. *c.* 39., to file a copy of the warrant, that copy is evidence against him. The object of the legislature was, to prevent him from saying there was any thing there, not in the original. I infer that, from the language of the second section, which provides that the warrant of attorney shall be deemed void, "unless such warrant of attorney, *or a copy* thereof, shall have been filed as aforesaid."

PARK, GASELEE, and ALDERSON Js. concurring, the rule was

Dischatged.

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May 7. COWPER and Another, Executors of NASH, *v.* GODMOND, Clerk.

In an action for money had and received, to recover the consideration money of a void annuity, where the annuity was granted more than six years before the action brought, but was treated by the grantor as a subsisting annuity within that period, although subsequently avoided at his instance, Held, that the statute of limitations did not begin to run until the annuity had been avoided.

THIS was an action of *assumpsit* for money had and received, and was brought to recover the balance of the consideration money for the purchase of a certain annuity. The Defendant had pleaded, first, *non assumpsit*; secondly, *non assumpsit infra sex annos.*

At the trial before *Tindal* C. J., *London* sittings after *Michaelmas* term, 1832, a verdict was found for the Plaintiffs for the balance claimed, subject to the opinion of the Court on the following case: —

By a certain indenture produced by the Plaintiffs, bearing date on the 31st day of *May*, 1824, an annuity of 237*l.* was granted by the Defendant for his life, to *Andrew John Nash* and *George Augustus Nash*: the consideration paid for the same was 1999*l.* The annuity was further secured by a warrant of attorney and judgment thereon for the sum of 4000*l.*, which were set forth in the grant of the annuity.

The indenture was duly executed by the Defendant, and the consideration money paid by the grantees. An error was committed in the memorial, by stating the amount of the annuity to be 257*l.* instead of 237*l.* Payments were made on account of the annuity in the year 1829, but not after. Writs of execution and sequestration upon the judgment mentioned in the annuity deed were sued out in 1829, to recover the arrears in that year, and the vicarage of the Defendant was sequestrated, and his goods and chattels taken in execution. Evidence was offered at the trial on the part of the Plaintiffs, that the said writs of sequestration and

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and execution were sued out at the request of the Defendant.

In *Michaelmas* term 1830, the Defendant obtained a rule in the Court of King's Bench, for setting aside the warrant of attorney and judgment, and the writs of execution and sequestration, on the ground of the defect in the memorial of the annuity, on the following terms ;— "upon payment of all the costs of the judgment and execution of the sequestration, and of the application by the Defendant."

The Plaintiffs were the executors of *Andrew John Nash*, who survived *George Augustus Nash* his co-grantee ; and they sought to recover by this action the balance of the consideration money originally paid for the annuity.

The annuity deed was put in evidence upon the trial uncancelled.

The questions for the opinion of the Court were, first, whether the statute of limitations was an answer to the action ; secondly, whether the Plaintiffs were entitled to recover, the annuity deed being uncancelled.

If the Court should be of opinion that the Plaintiffs were entitled to maintain the action, the verdict was to stand for the Plaintiffs.

If the Court should be of opinion the action was not maintainable, a nonsuit was to be entered.

Wilde Serjt. for the Plaintiffs. First, if the cause of action arose at the time when the deed was executed, it may be admitted that this action would be barred by the statute of limitations. But the Plaintiffs and their testator had no cause of action until *Michaelmas* term 1830, when the grantor had elected to avoid the annuity. Where a contract for an annuity has become void from a defect in the memorial, it does not lie with the grantee to rescind the contract and avoid the secu-

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rity given, at his option: nor can he maintain an action for money had and received, to recover back the consideration money, unless the grantor has done an act by which he treats the annuity as void. *Weddell* v. *Lynam and Jones.* (*a*) The principle of that case was recognized in *Waters* v. *Mansell* (*b*); and, subsequently, in *Davis* executrix of *Griffiths* v. *Bryan.* (*c*) The inference from these cases is, that the objection lies only in the mouth of that party for whose protection the formalities required by the annuity acts were prescribed; and that, if he choose to treat the contract as a legal one, the grantee, who is bound to see that the deeds are properly executed and enrolled, shall not be permitted to object. This contract was treated by the Defendant as a subsisting contract until 1830; the grantee, therefore, was precluded from questioning its validity until that time, and could not have brought this action for the consideration money. Then, the cause of action did not arise before that time, and the statute of limitations does not apply.

Walker v. *Liscaray* (*d*) will be cited to shew that the cause of action arose at the time of the original contract. There the annuity was granted in 1801, and set aside in 1805, for a defect in the memorial. An action was brought to recover the consideration money. The grantor having become bankrupt and obtained his certificate, after the grant, but before the annuity was set aside, it was held by Lord *Ellenborough* that the annuity, having been set aside, must be considered as if it had never existed; that the Plaintiff's title to the money was by relation, from the time it was paid on the void consideration, and that his right having preceded the bankruptcy, the certificate was a bar. [*Tindal* C. J.

(*a*) 1 *Esp.* 309.
(*b*) 3 *Taunt.* 56.
(*c*) 6 *B.* & *C.* 651.
(*d*) 6 *Esp.* 98.

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That case is at variance with all the others as cited.] It does not appear what else might have taken place between the parties. The case is reported very briefly, and was not afterwards brought before the Court.

But supposing the present case to fall *primâ facie* within the statute of limitations, payments have been made within six years on account of the annuity. This was always sufficient before the 9 *G.* 4. *c.* 14., and the first section of that act provides that nothing therein contained shall take away the effect of payments, &c.

Upon the second point, that the annuity deed was produced at the trial uncancelled, it is sufficient to observe, that, as all the securities for an annuity constitute but one assurance, the consideration fails upon the avoidance of any one of them. The grantee has a right to have his assurance entire, or to have his money returned. *Chawner* v. *Whaley* (*a*), *Scurfield* v. *Gowland.* (*b*)

Jones Serjt., *contrà*, did not insist on the second point; but, conceding that the grantee could not proceed until the grantor had elected to avoid the annuity, contended, nevertheless, that the period of limitation commenced from the payment of the consideration money. The action was brought for money had and received. Then, when was the money received? At the date of the void securities. It is true that the grantee could not bring *this* action until the contract had been treated by the grantor as an invalid contract of annuity; but, from the time of the grantor's electing so to treat it, the consideration money became, by relation, money had and received to the grantor's use from the original time of payment. *Walker* v. *Liscaray.* The present action is only maintainable on the ground that there never was a contract of annuity.

(*a*) 3 *East*, 500. (*b*) 6 *East*, 241.

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[*Alderson* J. In *Murray* v. *The East India Company*(*a*), which was an action by an administrator upon a bill of exchange, payable to the testator, but accepted after his death, it was held, that the statute of limitations began to run from the time of granting the letters of administration, and not from the time the bills became due, there being no cause of action until there was a party capable of suing.] Here it was the fault of the grantee, that he was unable to sue until the grantor had elected. It was his duty, either to see that the memorial was perfected, a duty cast upon him by the annuity acts; or to have given the grantor notice that the securities were invalid, and to have demanded a fresh security. That circumstance distinguishes the present case from *Murray* v. *The East India Company*, and brings it within the principle laid down in *Hewett* v. *Young*.(*b*) There the statute was held to run from the time when the Defendant, who was employed by the Plaintiff to lay out money upon good security, took a bad security; and not from the time when the insufficiency was discovered by the Plaintiff.

Then, the payments on account of the annuity, in 1829, are not sufficient to take the case out of the statute. These payments were made *diverso intuitu*, on account of a supposed contract of annuity. They cannot therefore avail in an action for money had and received, which is brought on an implied contract of a different nature, and to which the payments had no reference.

TINDAL C. J. The second point has been very properly abandoned; and the only question remaining is, whether the plea of the statute of limitations is a bar to

(*a*) 5 *B.* & *A.* 204.

(*b*) 5 *B.* & *C.* 259. and see *Battley and Another* v. *Faulkner and Another*, 3 *B.* & *A.* 288. *Short* v. *M'Carthy*, Ibid. 626. *Brown* v. *Howard*, 2 *B.* & *B.* 73. and *Whitehead* v. *Howard*, Ibid. 372.

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an action for money had and received for the recovery of the consideration money of a void annuity, when the annuity was granted more than six years before the action was brought, but was treated by the grantor as a subsisting annuity within that period. That question depends upon another: at what time did the cause of action arise? The cause of action comprises two steps. The first is the original advance of the money by the grantee; the second is the grantor's election to avail himself of the defect in the memorial of annuity. The cause of action, therefore, was not complete till the last step was taken in *Michaelmas* term, 1830.

If we were to decide otherwise, the grantor of a defective annuity might in every case defraud the annuitant, by paying the annuity for six years, and then, having set aside the securities, by pleading the statute of limitations.

I think that this case is tacitly decided by *Waters* v. *Mansell*, where the statute was also pleaded, but the point was not contended for on behalf of the Defendant, nor taken into consideration by the Court.

PARK J. I am of the same opinion. The grantee could not have sued until the step taken by the grantor in 1830: and until he could, the cause of action was not complete. I cannot assent to the language of Lord *Ellenborough* in *Walker* v. *Liskaray*. It is opposed to his own more deliberate judgment in the cases cited at the bar.

GASELEE J. concurred.

ALDERSON J. It may be conceded that the consideration money was money had and received by the grantor at the time of payment; but it was not had and

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received by the grantor, to the use of the grantee, until the grantor elected to treat the annuity as void.

If, however, we had decided otherwise, I think that the payments on account would have taken the case out of the statute; so that the Plaintiffs are in either way entitled to recover in this action.

Judgment for Plaintiffs.

May 8.

WOOLLEY, Executor, *v.* SLOPER, Executor.

Upon a judgment as in case of a nonsuit, an executor Plaintiff who has been guilty of wilful negligence is not liable to the costs of the cause, but only to the costs occasioned to the Defendant by such wilful negligence.

COVENANT by an executor, for a breach occurring since the death of his testator. Notice of trial had been three times served and countermanded. After the second default, a rule *nisi* for judgment as in case of a nonsuit had been discharged on a peremptory undertaking; and, after the third, made absolute. It further appeared from the Defendant's affidavits that the Plaintiff had been guilty of wilful negligence, on each occasion, in not proceeding to trial according to notice, whereby the Defendant had been put to unnecessary expense. On the taxation of costs, the prothonotary had allowed the Defendant the costs of the cause; and a rule *nisi* having been obtained by *Bompas* Serjt. for the prothonotary to review his taxation,

Wilde Serjt. contended, that the Plaintiff, having been guilty of wilful negligence, could not be protected from the payment of costs by his character of executor. *Shaw* v. *Mansfield* (*a*), *Nunez* v. *Modigliani.* (*b*)

(*a*) 7 *Price* 709. (*b*) 1 *H. Bl.* 217.

Bompas,

Bompas, in support of the rule, admitting the Plaintiff's laches, contended that a Plaintiff executor was not liable to pay the costs of the cause after judgment as in case of a nonsuit, although it might be otherwise on *non pros*, or a discontinuance. *Booth and others* v. *Wood* (*a*), *Hawes* v. *Saunders* (*b*), *Harris* v. *Jones*. (*c*) And,

Per Cur. The Plaintiff could only sue as executor upon the contract made with his testator. He would not, therefore, have been liable to pay costs upon becoming nonsuit at the trial; and the statute 14 *G.* 2. *c.* 17. directs "that all judgments given by virtue of that act, shall be of the like force and effect as judgments upon nonsuit, and of no other force or effect:" and "that the Defendant or Defendants shall upon such judgment, be awarded his, her, or their costs in any action or suit, where he, she, or they would upon nonsuit be entitled to the same, and in no other action or suit whatever."

Rule absolute for the prothonotary to review his taxation, allowing to the Defendant such costs only as had been occasioned by the Plaintiff's wilful negligence in not proceeding to trial. (*d*)

(*a*) 2 *H. Bl.* 277.
(*b*) 3 *Burr.* 1584.
(*c*) 3 *Burr.* 1451.
(*d*) See also *Howard* v. *Ratborne*, *Willes*, 316. *S. C. Barnes*, 130. *Howard* v. *Radburn*, 4 *Burr.* 1928. *Bennet* v. *Coker*, *Bull. N. P.* 332. *Higgs* v. *Warry*, 6 *T. R.* 654. *Cooke* v. *Lucas*, 2 *East*, 395. And, that an executor is liable to costs for not going to trial according to notice, see *Eaves* v. *Mocato*, *Salk*, 314. *Hawes* v. *Saunders*, 3 *Burr*, 1584.

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(IN THE EXCHEQUER CHAMBER.)

BARDONS *v.* SELBY.(*a*)

In *replevin*, the general plea *de injuriâ*, &c. held proper, after an avowry that Plaintiff was an inhabitant of the parish; rateable to the relief of the poor in respect of occupation of a tenement in the parish; that a poor rate was made and published, in which Plaintiff was rated at 7*l.*; that Defendant, as collector, gave him notice thereof and demanded payment, which Plaintiff refused; that he was thereupon summoned to appear at a petty sessions, where he appeared and shewed no cause; whereupon a warrant under the hands and seals of two justices was directed and delivered to Defendant to distrain Plaintiff's goods, which Defendant therefore avowed and prayed a return.

ERROR from the Court of King's Bench. The case was argued in *Hilary* vacation and *Easter* term by *Coleridge* Serjt. for the Plaintiff in error, and by *Maule* for the Defendant in error, and the judgment of the Court, in which the points are so fully discussed as to render any further report superfluous, was delivered in the vacation after *Easter* term by

TINDAL C. J. The question raised for our consideration upon this writ of error arises in an action of replevin, in which *Bardons*, one of the Defendants below, avows as collector of a poor rate, and *Jenkins*, the other Defendant, makes cognizance as his bailiff, alleging in the fourth avowry and cognizance, that the Plaintiff was an inhabitant of the parish, and by law rateable to the relief of the poor thereof in respect of his occupation of a tenement situate within the same; that a rate for the relief of the poor of the said parish was duly ascertained, made, signed, assessed, allowed, given notice of, and published according to the statute; and that by the said rate the Plaintiff was duly rated in the sum of 7*l.*; that *Bardons*, as collector, gave him notice of the rate, and demanded payment, which he refused; that the Plaintiff was duly summoned to appear at the petty sessions to be held at a time and place duly specified, to

(*a*) For the pleadings in this case, and the proceedings in the Court of K. B. see 3 *B.* & *Ad.* 2.

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shew cause why he refused; that he appeared and shewed no cause; that a warrant was thereupon duly made under the hands and seals of two justices of the peace for the county then present, directed to *Bardons*, the collector, commanding him, according to the statute, to make distress of the Plaintiff's goods and chattels; that the warrant was delivered to *Bardons*, under which he, as collector, avowed, and the other Defendant acknowledged, the taking of the goods, praying judgment and a return, &c. The Plaintiff pleaded in bar, that the Defendants of their own wrong, and without such cause as was alleged, took the Plaintiff's goods and chattels. To this plea there was a special demurrer, assigning for cause that the Plaintiff by his plea in bar sought to put in issue several distinct matters, and also that the plea in bar was pleaded as if the avowry and cognizance consisted wholly in excuse of the taking and detaining, and did not avow and justify the same, and claim a return. The Plaintiff below joined in demurrer. There were other avowries and cognizances pleaded in a similar form, to which similar pleas in bar were pleaded, and to which also there were special demurrers, and joinders in demurrer.

Upon argument before the Court of King's Bench, judgment was given in favour of the Plaintiff below by two of the learned Judges of that Court, the late learned and much-lamented Chief Justice, Lord *Tenterden*, having given judgment in favour of the Defendants; and the question raised upon the record for determination is this, whether the general plea in bar pleaded by the Plaintiff below, by which all the several matters alleged in the avowry are put in issue, is a good plea in bar or not: and we are all of opinion that such plea in bar is a good plea, and that the judgment of the Court below must be affirmed.

It may be convenient, in the first place, to advert to the

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the objection which relates to the form of action in which this general plea is used: namely, that it is in point of form an action of replevin, not an action of trespass: as to which, we are of opinion that no sound distinction can be made in that respect; but that wherever the facts pleaded in bar to an action of trespass for taking goods, constitute such a defence that the Plaintiff may, consistently with the rules of law, put the whole of them in issue, by the general replication *de injuriâ suâ propriâ absque tali causâ*, we think the Plaintiff may also do the same in his plea in bar to an avowry, stating the same identical facts as a defence in an action of replevin. No case has been cited before us, in which such general traverse of the facts stated in the avowry has been held bad simply upon the ground that the form of action is in replevin, not trespass. For as to the case of *Jones* v. *Hitchen* (*a*), the general traverse there pleaded in bar to an avowry for a distress for rent, and which was held bad in that case, would have been equally held bad if it had been replied to a special plea in trespass stating the same facts; as appears from the case of *White* v. *Stubbs*. (*b*) It cannot, therefore, as it appears to us, be a safe ground of decision, to rest the validity of the general traverse on the present occasion, not upon the nature and character of the facts which are put in issue by such traverse, and upon the broad question, whether they constitute one single defence, or not; but upon the consideration that the question arises in an action of replevin. The only ground of distinction that has been suggested is, that the Defendant, in this case, by claiming a return of the goods, asserts a right and property in them; and, therefore, brings the case within the exception in *Crogate*'s case, — "that the Defendant *claims* property, or an interest in or out of the goods which

(*a*) 1 *B.* & *P.* 76. (*b*) 2 *Saund.* 294.

have

have been taken." But upon reference as well to *Crogate*'s case, where this exception to the general rule is laid down, as also to the several cases in which such exception has been held to apply, we think it is limited to instances in which the Defendant has claimed by his plea an interest in the land or the goods before and at the time of the trespass complained of. In replevin, however, it is obvious that the Defendant does not insist, in ordinary cases at least, and certainly not in the present case, upon any right or interest he possessed in the goods before or at the time of the taking complained of. In the instance of a distress for rent in arrear, the very nature of the transaction assumes that he has seized the goods which belonged to his tenant the Plaintiff; his sole object being to satisfy the rent out of the tenant's property, and the prayer for a return of the goods, &c. is no assertion of right to, or interest in, the goods in himself the Defendant, but is a prayer that the *Plaintiff's* goods may be returned by the sheriff, in order, so long as the common law on this subject continued, that they might be kept by the Defendant as a pledge for the payment of the rent, and, since the alteration of the common law, by the statute *2 W. & M. c. 5.*, in order that they may be sold by the Defendant in satisfaction of the arrears of rent and the expenses. Indeed it is evident that the claim of interest mentioned in *Crogate*'s case, as forming an exception to the application of the rule there laid down, must mean an interest anterior to and independent of the fact of seizure, from the instances which are there put, of a right of common or a right of way, or passage, and the like; all of which, from their nature, must have existed in the party before the trespass was committed for which the action is brought. We think, therefore, no distinction can be satisfactorily laid down between the rule of pleading as to the point in question, in an action of replevin and an action of trespass;

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trespass; but that the point to be determined is, whether, by the rules of pleading, the several facts alleged in the fourth avowry might have been put in issue by the general traverse, if they had been contained in a plea in bar to an action of trespass. And although it may be very difficult, upon principle, to account for such a departure from the general object which the rules of special pleading have in view, namely, that of bringing the matter in dispute between the litigant parties to one certain and single issue of fact, yet we think the present case falls within the authority of judicial decisions of an early date, and which have been constantly adhered to in later times, and we feel ourselves, on that account, bound by their authority, and no longer at liberty to found our judgment upon the ground of expediency, where the point in dispute is of a nature and description rather to be governed by precedents than by general principles of law.

It is not necessary to refer to any earlier decision than that of *Crogate*'s case(*a*), as an authority upon the present question. Indeed, the year books cited in that case, do not, upon reference, throw much light or any degree of certainty on the points there resolved. But from the time of *Crogate*'s case, 6 *Jac.* 1., down to the present period, the resolutions of the Court made in that case have, as to the greater part, been considered to be law. In *Crogate*'s case the defendant, in an action of trespass for driving cattle of the plaintiff, pleaded a right of common in a copyholder over the *locus in quo*, by prescribing in the usual way, in the name of the lord of the manor; and because the plaintiff had wrongfully turned his cattle there, the defendant, as servant of the copyholder, and by his command, justified driving the cattle out. To this plea the plaintiff replied, *de in-*

(*a*) 8 *Rep.* 67.

juriâ

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juriâ suâ propriâ, absque tali causâ; and upon demurrer it was adjudged that the general replication in that case was insufficient; and Lord *Coke* then proceeds to lay down four resolutions of the Court, in the course of which he thus states the nature of this general plea; viz. "The general plea *de injuriâ suâ propriâ*, &c. is properly when the defendant's plea doth consist merely of matter of excuse, and of no matter of interest whatever." The resolutions of the Court are these four: first, that *absque tali causâ* doth refer to the whole plea, and not only to the commandment, for all makes but one cause, and any of them without the other is no plea by itself. Secondly, it was resolved that when the defendant in his own right, or as servant of another, claims any interest in the land, or any common, or rent going out of the land, &c., there *de injuriâ suâ propriâ*, &c., generally, is no plea; but if the defendant justifies as servant, there *de injuriâ suâ propriâ*, &c. in some of the cases, with a traverse of the commandment, that being made material, is good. Thirdly, it was resolved, that when by the defendant's plea any authority or power is mediately or immediately derived from the plaintiff, there, although no interest be claimed, the plaintiff ought to answer it, and shall not reply generally *de injuriâ suâ propriâ*, &c.: the same law of an authority given by law, as to view waste, &c. Lastly, it was resolved, that in the case at bar, the issue would be full of multiplicity of matter, when an issue ought to be full and single; for parcel of the manor, demiseable by copy, grant by copy, prescription of common, &c., and commandment, will be all parcel of the same.

The questions, therefore, appear to us to be these two alone; first, whether the facts pleaded in this avowry bring it within that description of plea to which the general replication is admitted in *Crogate*'s case to apply; and secondly, whether the case falls within any of the exceptions

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exceptions laid down by the Court, in their resolutions in that case. Now the facts stated in the avowry are, the inhabitancy of the Plaintiff in a certain parish, and his liability to the poor rate by reason of occupation; the making of a poor rate for the parish, with all the particular observances required by law; notice of the rate; the demand of payment, and refusal to pay; the summoning before the justices of peace in petty sessions, to shew cause for his refusal, where no cause was shewn; the issuing of a warrant by the justices of the peace; the delivery of the warrant to one of the Defendants, and the distress made by him and the other Defendant as his bailiff.

In the first place, these facts appear to us, in the language of *Crogate*'s case, to consist merely "of matter of excuse, and of no matter of interest whatsoever." They fall within the principle of a justification under a proceeding in the admiralty court, the hundred or county court, or any other, which is not a court of record, where *de injuriâ*, &c. generally is good, "for all is matter of fact, and all make but one cause," as is stated in another part of the same report. The case now under discussion resembles closely that which is last referred to. A justification under a distress warrant for a poor's rate must surely be the subject of a general traverse, if a justification under the process of the Admiralty Court is held to be so.

It remains to be considered, therefore, whether the subject-matter of the avowry brings it within any of the exceptions which are laid down in the leading case above referred to. The first is where the defendant in his own right, or as servant to another, claims any interest in or out of the subject-matter of the action of trespass, in which case the general traverse would be bad. The interest there spoken of would include any title by lease, licence, or gift from the plaintiff, (*Bro. Abr. de son tort demesne*, 41.)

or

or any sub-demise to the defendant. (*Bro. Abr. ib.* 53.) The answer, therefore, to this objection appears to be, that the Defendants in this case claim no such interest, nor any other interest of any kind in the goods taken: for that the exception applies only to the case of title or property in the goods, independently of any right conferred by the act of seizure, we have already stated to be our opinion, to which we refer.

The next exception is, where the Defendant justifies under any authority or power mediately or immediately derived from the Plaintiff; in which case it is said, that although no interest is claimed, the Plaintiff ought to answer it, and shall not reply generally *de injuriâ suâ propriâ*. It would not have been necessary to have adverted to this exception, as the proceedings on the part of the Defendants are manifestly not under any authority from the Plaintiff, but directly against him, if Lord *Coke* had not proceeded to add, "the same law of an authority given by the law, as to view waste." But the meaning of this distinction is explained by Lord *Holt* in the case of *Chancy* v. *Winn* (*a*), who says the case of entering to see *waste* is upon a special reason; for suppose the lessor were seised in fee, such seizin in fee would be involved in the issue. That the dictum of Lord *Coke* cannot be intended of justification under *all* authorities in law, generally, is abundantly clear from the instances already adverted to of justification under process of law against the person, and against the goods of the Plaintiff; so also of justification by peace officers arresting upon breach of the peace, and the like; so also in the case of justification under a statute; (see *Chancy* v. *Winn*, *suprà*); in all which cases the general traverse is invariably replied to such pleas, where no matter of record forms part of it. If so, why may it

(*a*) 12 *Mod.* 582.

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not equally be replied, where the justification is under a distress for a poor's rate being an authority of law?

The last of the exceptions mentioned in *Crogate's* case is, where the plea would be full of multiplicity of matter. Whether this is, or is not, a ground of exception that applies to the present case, must depend upon the meaning of the word *multiplicity* in the resolution. If it intends that separate and distinct facts, constituting altogether one defence, cannot be included in the general replication, what becomes of the rule in *Crogate's* case altogether? Why did the discussion in *Crogate's* case take place, and why were the four resolutions made, when the single objection, that the plea included more than one separate fact, would have been sufficient to have determined against the general traverse? How is this interpretation reconcileable with the various instances in which this general form of replication is confessedly held good, such as the justification under process issuing out of a court not of record? Where facts are stated in the plea mixed up with matter of record, or with the claim of interest, or under the authority of the Plaintiff, it has always been allowed that the Plaintiff might admit the fact which falls within the description of such exceptions, and traverse the remainder of the allegations of the plea, by limiting the traverse by the words "*absque residuo causæ.*" How could this practice of pleading be applied to the present case, where none of the facts alleged fall within the exception, and all the facts are of the same nature? It follows, therefore, that such cannot be the meaning of the word *multiplicity*, and, consequently, that the resolution does not apply to this case. And such appears clearly to have been the opinion of the Court of B. R. in two modern cases, *Robinson* v. *Raley* (*a*) and *O'Brien* v. *Saxon*. (*b*)

Upon the whole, we think this case falls within the

(*a*) 1 *Burr.* 316. (*b*) 2 *B.* & *C.* 908.

general

general rule laid down in *Crogate*'s case, and that it is not touched by any of the exceptions there adverted to; and, consequently, that the judgment of the Court below must be affirmed.

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Judgment affirmed. (*a*)

(*a*) See *Piggott* v. *Kemp and Others*, 1 *Crompton & Meeson*, 197.

CHRISTOPHER HENRY THOMAS HAWKINS, an Infant, by JOHN HEYWOOD HAWKINS, his next friend, *v.* JOHN HAWKINS and MARY ANN HAWKINS.

April 26.

Lands were settled by deed in tail male, on such person as at the decease of *T. H.* should be the second son then living of *T. H.* and *A. H.*; and, for default of such issue, to the third, fourth, and so on, (other than and except the eldest,) in like manner; for default of such issue, to the eldest or only son in tail male; and, for default of such issue, to *T. H.* in fee. *T. H.* died in 1766, leaving four sons, *P.*, *C.*, *T.*, and *J.* — *P.* died in 1770, an infant, without issue; *C.* in 1829, without issue; *T.* in 1783, without issue.

Upon a suit instituted after the death of *C.*: Held, that in the events which had happened, *J.* took an estate tail under the settlement.

BY order of the Vice Chancellor the following case was sent for the opinion of this Court: —

By marriage settlement of 16th and 17th of *June* 1756, made upon the marriage of *Thomas Hawkins* with *Ann Heywood*, (after reciting that ample provision had been made for *Thomas Hawkins*'s eldest son by such marriage, under the will of his uncle *Philip*; that *Ann Heywood*'s father had paid 8000*l.* as a marriage portion to his daughter, and *Thomas Hawkins*'s father 5000*l.* to his son;) certain estates in the parishes of *Maddern*, *St. Erth*, *Ludgvan*, *Uny*, *Lelant*, and *Mullion*, in the county of *Cornwall*, were limited, subject to certain prior trusts, to the use and behoof of such person as at the time of the decease of the said *Thomas Hawkins* should be the second son then living of the body of the said *Thomas Hawkins*, on the body of the said *Ann Heywood* to be begotten, and of the heirs of the body of such second son lawfully

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issuing; and for default of such issue, to the use and behoof of the third, fourth, fifth, sixth, and all and every other son and sons, other than and except the eldest son, for the time being, of the body of the said *Thomas Hawkins*, on the body of the said *Ann Heywood* to be begotten, who should by the death of such second, third, fourth, or other son, without issue of his or their respective body or bodies, become a second son severally and successively, and in remainder, one after another, as they and every of them should be in priority of birth; and of the several and respective heirs of the body and bodies of all and every such son and sons lawfully issuing; and for such default of such issue as aforesaid, and in case there should be two or more daughters of the said *Thomas Hawkins*, on the body of the said *Ann Heywood* to be begotten, then to the use of all and every such daughters of the said *Thomas Hawkins*, on the body of the said *Ann Heywood* to be begotten, and the heirs of their several and respective bodies lawfully issuing, to take as tenants in common, and not as joint-tenants: but in case there should be only one son of the said *Thomas Hawkins*, on the body of the said *Ann Heywood*, then to the use of the eldest or only son of the said *Thomas Hawkins*, on the body of the said *Ann Heywood*, his intended wife, to be begotten, and the heirs of the body of such eldest or only son lawfully issuing; and for default of all such issue, to the use of the said *Thomas Hawkins*, his heirs and assigns for ever.

Thomas Hawkins died intestate, in 1766, leaving issue of said marriage four sons and one daughter: the sons were, *Philip*, the eldest, who survived his father, and died, in 1770, an infant, and without issue; Sir *Christopher Hawkins*, who was the second son, and died in 1829, without issue; *Thomas Hawkins*, the third, who died in 1783, without issue; and the Defendant *John Hawkins*, who

who was the fourth son of the said marriage, and still living.

In 1780, Sir *Christopher Hawkins* suffered a recovery of divers estates, comprising, amongst others, the manor of *Treveneague*, and certain tenements in *Market Jew*, alias *Marazion*, and in the parish of *Maddern*, which he took as tenant in tail under the will of his great uncle, *Philip Hawkins;* and in the deed to make a tenant to the *præcipe*, after describing such property, were added, "And all other the manors, &c. which were included in the entail under the will of said *Philip Hawkins*, and all and singular other the manors, messuages, lands, tenements, and hereditaments of him the said Sir *C. Hawkins*, situate, lying, and being in the several parishes, places, and precincts aforesaid, or either of them, in the said county of *Cornwall*."

The township of *Market Jew*, alias *Marazion*, and the parish of *Maddern*, were mentioned in the recovery deed, and in the recovery; but the parish of *St. Erth* was only mentioned in the recovery; and the parishes of *Ludgvan*, *Uny*, *Lelant*, and *Mullion*, were not mentioned in either the recovery deed or the recovery.

By the will of Sir *C. Hawkins*, all such parts of the settled property of which he obtained the fee by means of the recovery, and also the reversion in fee of the remainder, subject to the estate tail, if any, limited by the said settlement to the Defendant *John Hawkins*, were devised to the infant Plaintiff, *Christopher Henry Thomas Hawkins*, the son of testator's brother *John*, for his life, with remainders over.

The questions for the opinion of the Court were, first, Whether *John Hawkins*, the fourth son of *Thomas Hawkins*, the father of the said Sir *C. Hawkins*, did, under or by virtue of the indentures of lease, release, and settlement of 1756, either in the lifetime or on the death of the said Sir *C. Hawkins*, and in the events

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which have happened, take any and what estates or interests in the several messuages, lands, hereditaments, and premises comprised in the said indentures of lease, release, and settlement of 1756, or any and which of them?

Secondly, Whether, having regard to the terms of the indentures to make the tenant to the *præcipe* for, and to lead or declare the uses of, the said recovery, which was suffered by the said Sir *C. Hawkins* in 1780, such recovery comprised any and which of the several messuages, lands, and hereditaments conveyed by the said indentures of lease, release, and settlement of 1756, and thereby limited to the use and behoof of such persons as at the time of the decease of the said *Thomas Hawkins* should be the second son then living of the said *Thomas Hawkins*, on the body of the said *Ann Heywood* to be begotten, and of the heirs of the body of such second son lawfully issuing?

Taddy Serjt. for the Plaintiff. The defendant, *John Hawkins*, cannot take under the limitations of this settlement; for neither at the death of his father *Thomas Hawkins*, nor at the death of his brother Sir *Christopher*, did he answer the description of second son of *Thomas Hawkins*. The limitation gives a vested indefeasible estate to the person who shall be second son of *Thomas Hawkins*, living an elder. For in *Driver* v. *Frank* (*a*), *Dampier* J. says, "It has always been an object with courts of law and equity to vest interests as soon as the words of the instrument will admit of it: such a construction is convenient, as it facilitates provisions for families, by ascertaining the rights and property belonging to each member of it, and tends in general to an equal and fair arrangement and distribution:"

(*a*) 3 *M.* & *S.* 32.

bution:" and cites several authorities in support of that position. So in *Trafford* v. *Ashton* (*a*), Lord *Cowper* held that a second son took an estate by that description, being second in order of birth, though the elder brother was dead before the second was born. The case of *Lomax* v. *Holmden* (*b*) only shews that the first son at the time of a testator's death may take under the description of first son in a will, where a former son has died after the making of the will, in the testator's lifetime. Also, that the same person may answer the description of *primogenitus* and *secundus*. Year-Book, 9 *H.* 7. 25. *a*. Here the estate was vested in Sir *Christopher*, as second son in the lifetime of his brother *Philip*; nothing has occurred to devest that estate; and therefore it passes to his devisee.

Merewether Serjt., for the Defendant, admitted that no question could arise as to the estates in *Maddern* and *St. Erth*, to which the recovery applied; but, as to the others, — *Alwarne*, one third of the manor and barton of *Trewinnard*, *Trewinnard Mills*, *and Colrogger*, — contended, that the manifest intention to be collected from the whole deed of 1756 was, that the eldest son of *Thomas Hawkins* should never have them, being otherwise amply provided for; and Sir *Christopher*, having been put in the situation of eldest son upon the death of *Philip* without issue, could not retain lands which were clearly designed as a provision for a second son. In this respect, the present case was distinguishable from *Driver* v. *Frank*, where it did not expressly appear that provision had been made for an elder son.

The following certificate was afterwards sent: —
We have heard this case argued before us by counsel,

(*a*) 2 *Vern.* 660. (*b*) 1 *Ves.* 290.

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and have considered it, and we are of opinion, that *John Hawkins*, the fourth son of *Thomas Hawkins*, father of the said Sir *Christopher Hawkins*, did, under and by virtue of the said indentures of lease, and release, and settlement of the 16th and 17th of *June* 1756, on the death of the said Sir *Christopher Hawkins*, and in the events which have happened, take an estate in tail general in the messuages, lands, tenements, and hereditaments called *Allwarne*, alias *Alwerton*, alias *Alwarnton*, alias *Alwarton*, and the grist-mill thereto belonging; one third of the manor and barton of *Trewinnard*, and the mills called *Trewinnard* mills; and also all that messuage or tenement called *Colrogger*, being part of the premises comprised in the said indentures of lease, and release, and settlement of the 16th and 17th of *June* 1756.

N. C. TINDAL.
J. A. PARK.
S. GASELEE.
E. H. ALDERSON.

END OF EASTER TERM.

AN

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TO THE

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   After the amount had been ascertained, and before it was paid *S.* became a bankrupt.

   Held, that notwithstanding the bankruptcy of *S.*, *J.* might sue *G.* for the amount of his debt to *J.* *Crowfoot and Others, Assignees of Streather, a Bankrupt,* v. *W. B. Gurney.* 372

7. If

7. If a trader, from the dread of an arrest, abstains from going to a place to which he would have gone but for such dread, he thereby commits an act of bankruptcy by "absenting himself with intent to delay creditors." *Robson and Others* v. *Rolls and Another.* *Page* 648

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Plaintiff purchased in the market a bill drawn by *G.* at *Rio Janeiro*, and payable at sixty days' sight; the exchange falling after the purchase, Plaintiff kept the bill nearly five months, and then sold it again.

The drawee having failed before presentment, Plaintiff, after paying his indorsee the amount of the bill, sued the Defendant, the drawer:

Held, that the jury were correctly directed to consider, whether, looking at the situation and interests of both drawer and holder, there had been unreasonable delay on the part of the Plaintiff in forwarding the bill for acceptance or putting it in circulation; and the jury having found for the Plaintiff, the Court refused to disturb the verdict. *Mellish* v. *Rawdon.* 416

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3. Costs of an arbitration under an order of *Nisi Prius* are not *costs in the cause*. *Taylor* v. *Lady Gordon*. 570
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3. Tenant for life and his eldest son, the remainder-man in tail, leased to *E. S.* for ninety-nine years, and gave *E. S.*, who was acquainted with their title, a bond conditioned for the due observance of their covenant for quiet enjoyment. *E. S.* underlet to *W.* for sixty years, and covenanted with *W.* against eviction by any one claiming under *E. S.*, or by his acts, means, consent, *neglect*, *default*, privity, or procurement.

Tenant for life and his eldest son being dead, without issue, *W.* was evicted by the next remainder-man in tail: Held, that *E. S.* was not liable on his covenant to *W.*, the eviction being by title paramount, which *E. S.* had no means of defeating. *Woodhouse* v. *Jenkins*. 430

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2. The Defendant had pleaded truth in justification of a libel, part of which alleged that a physician, in refusing to act with Plaintiff, also a physician, had "honourably and faithfully discharged his duty to his medical brethren:" Held, that it was not competent to the Defendant to offer in evidence the opinion of a medical witness on this head. *Ramadge* v. *Ryan.* 333

5. On the 25th of *October*, *W.*, a trader, being pressed by *L.* for the payment of a debt, promised to give security the next day. Instead of doing so, *W.* went away immediately, gave security to *G.*, and did not see *L.* again till the 20th of *November*, when he

he had a conversation with *L.* about the security given to *G.*

W. having been declared a bankrupt, and his assignees relying on an act of bankruptcy alleged to have been committed in giving this security to *G.*, Held,

That the declarations made by *W.* to *L.* on the 20th of *November*, were admissible evidence towards establishing the act of bankruptcy. *Ridley and Others, Assignees of White, a Bankrupt*, v. *Gyde.* *Page* 349

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In the beginning of *October*, in consequence of this letter, the debtor, then in insolvent circumstances, paid the debt. On the 21st of *November* he petitioned the Insolvent Debtors' Court for his discharge: Held, that the payment to Defendant was not *voluntary*, within the meaning of *s.* 32. 7 *G.* 4. *c.* 57., although the Defendant never commenced in action. *Reynard, Assignee of Birch, an Insolvent,* v. *Robinson.* 717

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2. The interpleader act does not apply to a case where the Defendant has a legal claim. *Braddick* v. *Smith.* 84

JOINDER.

See PLEADING, 1. TURNPIKE.

JOINT STOCK COMPANY.

See *antè*, vol. vi. p. 776. *Fox* v. *Clifton and Others.* 115

LANDLORD AND TENANT.

See REPLEVIN.

1. "Unless you pay what you owe me, I shall take immediate measures to recover possession of the property," addressed to a tenant at will, by the party entitled in fee: Held, a sufficient determination of the will. *Doe dem. R. Price* v. *T. Price.* *Page* 356
2. The property in trees is in the landlord; the property in bushes is in the tenant, even where they are cut down by a stranger. *Berriman* v. *Peacock.* 384

LIBEL.

See PLEADING, 5.

LIEN.

See CHARTERPARTY.

LIMITATIONS, STATUTE OF.

In an action for money had and received, to recover the consideration money of a void annuity, where the annuity was granted more than six years before the action brought, but was treated by the grantor as a subsisting annuity within that period, although subsequently avoided at his instance, Held, that the statute of limitations did not begin to run until the annuity had been avoided. *Cowper and Another, Executors of Nash,* v. *Godmond, Clerk.* 748

MEMORANDA, 286. 453. 664.

MEMORIAL.

See PLEADING, 2.

MONEY HAD AND RECEIVED, ACTION FOR.

Where money is paid after suing out process to recover it, the Defendant, before he pays, knowing the cause of action for which the writ is sued out, and there being no fraud on the part of the Plaintiff, no action is maintainable to recover such money back. *Hamlet and Others* v. *Richardson.* *Page* 644

NEWSPAPER.

A person who lets out types and men to print a newspaper, is not the printer within the meaning of 38 *G.* 3. *c.* 78.; the party who hires the types and superintends the printing is the person responsible to the stamp office. *Bagster* v. *Robinson.* 77

NEW TRIAL.

See ARBITRATION, 2. COSTS, 1. EVIDENCE, 4. PRACTICE, 2.

OFFICE.

1. The office of paymaster of exchequer bills is an office during pleasure only, and not during good behaviour, under the provisions of 48 *G.* 3. *c.* 1.

2. The appointment of a paymaster in the room of another is, of itself, a revocation of the first appointment.

3. Such former appointment may be so revoked, although the writing conferring that appointment contain no power of revocation. *Smyth* v. *Latham.* *Page* 692

PARISH CLERK.

Two parishes having been united, in which, before the union, the parish clerk was appointed by the parishioners and the rector, Held, that after the union, an appointment by the rector alone was invalid. *Hartley* v. *Cook and Another.* 728

PARTNERS.

See JOINT STOCK COMPANY.

PAYMENT INTO COURT.

See PRACTICE, 15.

PEER.

See EXECUTION, 2.

A recovery suffered by the son of a peer may pass, though the acknowledgment be signed with his name of courtesy, and not with his true name, provided he be described on the record as "*commonly called* lord, &c." *Newark, Vouchee.* *Page* 397

PLEADING.

See TURNPIKE.

1. An action for costs incurred in opposing a petition against the return of a member of parliament may be brought against one of several petitioners, under 9 *G.* 4. *c.* 22. *Gurney* v. *Gordon and Another.* 37

2. 1. To a cognizance for the arrears of an annuity, the Plaintiff pleaded that a memorial of all the deeds &c., by which the annuity was granted, the names of the witnesses, the consideration, &c. was not enrolled in the Court of Chancery: the Defendants replied that a memorial of all the deeds, &c., the names of the witness, the consideration, &c. was enrolled; and after setting out the memorial at length, concluded with a *prout patet per recordum:* Held, sufficient on demurrer alleging that the conclusion should have been to the country.

2. A judgment on a warrant of attorney being one of the securities, and the judgment being referred to, as entered up: Held, that it need not be set forth in the memorial. *Richardson* v. *Tomkies and Another.* 51

3. To a plea that the Plaintiff had released one of two joint obligors, the

the Plaintiff replied that the release was given with an undertaking on the part of the Defendant, the other obligor, that the release should not operate in his discharge: Held, ill. *Cocks* v. *Nash*. *Page* 341

4. A general averment of performance, "*according to the provisions of the said agreement*," is sufficient on general demurrer, although the agreement contains conditions precedent, averment of the performance of which would have been indispensable on special demurrer. *Varley* v. *Manton*. 363

5. 1. To an action for a libel charging Plaintiff with having, in two mayoralties, bought coals at 6*d*. a bushel, having sold them to the poor at 4*d*., and having charged the corporation 8*d*.; thereby pocketing 2*d*. a bushel; Defendants pleaded that the Plaintiff did this in his first mayoralty, and in his second altered his charges, buying the coals at 6*d*., selling them to the poor at 3*d*., and charging the corporation 6*d*.; Held, ill.

2. The Court will not award a repleader, except where complete justice cannot be answered without it. *Goodburne* v. *Bowman and Others*. 532

6. Averment, that the Defendant, who had made a note promising to pay Plaintiff 10*l*. fourteen days after date, and had delivered it to Plaintiff, promised, when it was due, to pay Plaintiff according to the tenor and effect thereof, Held, sufficient on special demurrer. *Bancks* v. *Camp*. *Page* 604

7. The demandant having omitted to set forth his pedigree upon the count in a writ of right, the Court refused to allow him to amend, even upon an affidavit of merits, and that the omission had been occasioned by the oversight of an experienced pleader at the bar. *Worley* v. *Blunt*. 635

8. To a declaration on a general acceptance of a bill of exchange, Defendant pleaded that the acceptance was qualified, and that according to the statute in such case made and provided, in the acceptance he expressed that he accepted the bill "payable at a certain place only, to wit, No. 32. *Albany Street*, that is to say, *and not otherwise or elsewhere*:" Plaintiff replied that the acceptance was a general acceptance, and that the Defendant did not in the acceptance express "that he had accepted the bill payable at a certain place only, in manner and form as the Defendant had alleged:"

Held, on a special demurrer, a sufficient traverse.

Held, also, that the plea should have alleged that no presentment for payment was made at the place appointed. *Lyon* v. *Walls*. 660

9. The mis-statement of the form of action at the commencement of a declaration is an irregularity only, and not fatal on special demurrer.

murrer. *Anderson and Another* v. *Thomas.* *Page* 678

10. 1. In *quare impedit*, the ordinary, unless he has collated, cannot counterplead the Plaintiff's title to the patronage.

2. The declaration shews a sufficient avoidance of a living, if it alleges that the incumbent accepted another benefice with cure of souls, although it contains no allegation that the benefice held by the incumbent was of the value of 8*l.* *Apperley, Clerk*, v. *Bishop of Hereford.* 681

11. Declaration on bail-bond set out *capias* in *assumpsit* to take *S. P. and W. P.*—the arrest of *S. P.*—and the execution of a bail-bond conditioned that *S. P.* should appear to answer Plaintiff in an action of *assumpsit*:

Held, not such a discrepancy between the *capias* and condition of the bond as to be objectionable on general demurrer. *Grottick* v. *Phillips and Others.* 721

12. In *replevin*, the general plea *de injuriâ*, &c. held proper after an avowry that Plaintiff was an inhabitant of the parish; rateable to the relief of the poor in respect of occupation of a tenement in the parish; that a poor rate was made and published, in which Plaintiff was rated at 7*l.*; that Defendant, as collector, gave him notice thereof and demanded payment, which Plaintiff refused; that he was thereupon summoned to appear at a petty sessions, where he appeared and shewed no cause; whereupon a warrant under the hands and seals of two justices was directed and delivered to Defendant to distrain Plaintiff's goods, which Defendant therefore avowed and prayed a return. *Bardons* v. *Selby.* *Page* 756

POOR.

Where a party, having no stock in trade, is rated as an *inhabitant* of a parish, his remedy is by appeal to the quarter sessions. Replevin does not lie for a distress under such a rate. *Marshall* v. *Pitman.* 595

PRACTICE.

See AMENDMENT. BAIL, 1, 2. EVIDENCE, 10.

1. The Court refused to restrain the Defendant's attornies from acting in the cause, on the ground that they had obtained a knowledge of the Plaintiff's case in the course of a Chancery suit, in which they had been acting in conjunction with the Plaintiff, and in which the Defendant had no interest; the Defendant's attornies deposing, that, in that suit, they acted also for the Defendant. *Grissell and Others, Executors of W. Peto,* v. *J. Peto.* 1

2. After a trial has been had, the Court will not grant a *venire de novo*, on an allegation that the jury has been convened by the partner of the Plaintiff's attorney; at least without proof that the party who objects was not aware of

of the fact at the trial. *Brunskill* v. *Giles.* *Page* 13

3. Before applying to Court to compel a party to give security for costs, application should be made to the party. *Adams* v. *Brown.* 81

4. Defendant put in bail by affidavit, but omitted to give four days' notice of justification: Plaintiff having proceeded on the bail-bond, the Court refused to stay proceedings upon an application made within twenty days after justification. *Goddard* v. *Jarvis.* 88

5. A Judge at chambers has authority to order costs. *Doe d. Prescott* v. *Roe.* 104

6. The Court will discharge a rule for a special jury, where it has not been duly acted on, and appears to have been obtained for the purpose of delay. *Stanbury* v. *Gillett.* 319

7. Fine allowed to pass without affidavit on parchment, under what circumstances. *Wickham, Demandant; Foreman and Wife, Deforciants.* 332

8. Under the rule of *Michaelmas* 1654, *s.* 17. a party has a right to amend after plea in abatement on payment of costs, but the Court, or a Judge, have a discretion to allow him to amend without costs. *Wall* v. *Lyon.* 411

9. A *distringas* under 2 *W.* 4. *c.* 39. must be issued expressly for one of two purposes, either to compel appearance or with a view to outlawry; not in the alternative. *Fraser* v. *Case.* 464

10. Where a sheriff has illegally arrested a Defendant in one action, he cannot detain him in another. *Barratt* v. *Price.* *Page* 566

11. Affidavit to hold to bail for 50*l.*, for money had and received to Plaintiff's use, and money lent by Plaintiff, without distinguishing how much is due on one account and how much on the other: Held, sufficient. *Hague* v. *Levi.* 595

12. Notice of trial given by an attorney who has omitted to take out his certificate, is irregular. *Patterson* v. *Powell.* 620

13. Upon an issue under the interpleader act, where money is paid into Court to abide the event, the successful party is not allowed to take the money out of Court after verdict and before judgment. *Cooper* v. *Lead Smelting Company.* 634

14. The Court will not stay the proceedings in a writ of right, till the costs of a prior ejectment for the same lands are paid. *Bowyear* v. *Bowyear.* 670

15. In *assumpsit* for the breach of an agreement to sell an estate, the Court refused to allow the Defendant to select certain of several allegations of damage contained in a single count, and pay money into Court on those particular allegations. *Hodges* v. *Lord Litchfield.* 713

PREROGATIVE.

See EXECUTOR, 2.

PRINCIPAL AND AGENT.

1. Defendant, an auctioneer, was employed by *C.*, a person in embarrassed circumstances, to sell his property; Defendant sold, and paid the proceeds to *C.*'s order: *C.* having shortly afterwards been declared insolvent; Held, that the Defendant was not liable to *C.*'s assignee, although the Defendant, when he sold the property, was aware of *C.*'s embarrassment. *White, Assignee of Catling, Insolvent*, v. *Bartlett.* *Page* 378
2. *Hardman* v. *Willcock*, S. P. 382

PROVISIONAL ASSIGNEE.

See BANKRUPT, 3.

PURCHASER.

B. after marriage having made a settlement on his wife, obtained from the trustees the title deeds of the property settled, and deposited them with a banker as a security for money advanced:

Held, that the banker was not a purchaser within the *27 Eliz. c. 4. s. 2.*, and that the trustees were entitled to recover the deeds. *Kerrison and Another* v. *Dorrien and Others.* 76

QUARE IMPEDIT.

See PLEADING, 10.

REGULÆ GENERALES, 442. 663.

RELEASE.

See PLEADING, 3.

REMAINDER.

Lands were settled by deed in tail male, on such person as at the decease of *T. H.* should be the second son then living of *T. H.* and *A. H.*; and, for default of such issue, to the third, fourth, and so on, (other than and except the eldest,) in like manner; for default of such issue, to the eldest or only son in tail male; and, for default of such issue, to *T. H.* in fee. *T. H.* died in 1766, leaving four sons, *P.*, *C.*, *T.*, and *J.* — *P.* died in 1770, an infant, without issue; *C.* in 1829, without issue; *T.* in 1783, without issue.

Upon a suit instituted after the death of *C.*: Held, that in the events which had happened, *J.* took an estate tail under the settlement. *Hawkins* v. *Hawkins.* *Page* 765

REPLEVIN.

Defendant having only a defeasible title demised to Plaintiff for years; before the first quarter's rent was due, Plaintiff was evicted by title paramount to Defendant's, and remained out of possession for some weeks; he then entered again under a new agreement with the person who had evicted him by title paramount:

Held, that Defendant was not entitled to distrain, and that the eviction might be given in evidence on the issue of *non tenuit*. *Hopcraft* v. *Keys*. *Page* 613

REVOCATION.

See OFFICE.

SEQUESTRATION.

See ANNUITY.

SHERIFF.

See WARRANT OF ATTORNEY.

A sheriff, who has seized goods under a *fi. fa.*, and has sold and delivered them after a secret act of bankruptcy committed by the Defendant, but before a commission issues against him, is liable in trover to the assignees under the commission. *Balme and Others, Assignees of Bankhart and Benson, Bankrupts*, v. *Hutton and Others*. 471

SPECIAL JURY.

See PRACTICE, 6.

TAXES.

See BOND.

TRADING.

See BANKRUPT, 1.

TRAVERSE.

See PLEADING, 8.

TRESPASS.

See LANDLORD AND TENANT, 2.

TROVER.

See SHERIFF.

TRUSTEE.

A fine may be levied by a trustee, substituted for a missing trustee, under 6 *G.* 4. *c.* 74. *s.* 5. *Jackson, Demandant; Ward and Wife, Conusees*. *Page* 399

TURNPIKE.

Where two persons fill the office of clerk to the trustees of a turnpike road, both must join in executing a contract on the part of the trustees, under 3 *G.* 4. *c.* 126. *s.* 57. *Bell and Head* v. *Nixon and Davison*. 393

VARIANCE.

See PLEADING, 11.

WARRANT OF ATTORNEY.

See EVIDENCE, 11.

1. A warrant of attorney not filed pursuant to 3 *G.* 4. *c.* 39. *s.* 2. is not

not void generally, but only as against an assignee under a valid commission of bankruptcy.

2. The sheriff is liable to an action for not selling under a *fi. fa.* with reasonable expedition. *Aireton* v. *Davis.* *Page* 740

WITNESS.

See EVIDENCE, 7, 8.

WRIT OF RIGHT.

See PRACTICE, 14. EVIDENCE, 9. PLEADING, 7.

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LONDON:
Printed by A. SPOTTISWOODE,
New-Street-Square.

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